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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 218

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, APPELLANT,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN; RICHARD ABRAM, CHAIRMAN AND STATE LEGISLATIVE REPRESENTATIVE, AND ILLINOIS COMMERCE COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED JULY 10, 1942.

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[fol. a] [Caption omitted]

[fol. 1]

IN SUPREME COURT OF ILLINOIS, NOVEMBER TERM, A. D. 1941

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative, and Illinois Commerce Commission, Plaintiffs-Appellants,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Defendant-Appellee

Appeal from Circuit Court, St. Clair County

Honorable D. H. Mudge, Trial Judge

Abstract of Record—Filed August 30, 1941

Placita.

Letter of transmittal from Illinois Commerce Commission to Clerk of the Circuit Court of St. Clair County, Illinois, filed March 27, 1940, reciting receipt of Notice of Appeal taken on behalf of Terminal Railroad Association of St. Louis from the Commission's Order entered on February 1, 1940, attaching certified copy of order of said Commission.

DECISION OF COMMISSION

Certified copy of order entered by the Commission on February 1, 1940, as follows:

BY THE COMMISSION:

On March 4, 1938, the Brotherhood of Railroad Trainmen of Illinois, complainant herein, filed a complaint with the Commission alleging the failure of the Terminal Railroad Association of St. Louis, respondent herein, to pro-
[fol. 2] vide caboose cars for switchmen in the territory in, around and about East St. Louis, Illinois. The complaint filed herein further alleges that as a result of the failure to provide the said caboose cars, the switchmen, in

the performance of their duties on transfer trains, are necessarily required to ride on the draw bar in between freight trains, or on the top of, or on the side of freight cars where numerous reduced vertical and horizontal clearances prevail.

The complaint further alleges that the life, health and safety of the aforesaid switchmen of transfer cars and of other employees of said respondent and of the public are endangered by the aforesaid failure to provide the said caboose cars within the State of Illinois.

On April 6, 1938, respondent herein filed its answer to the above described complaint in which it is expressly denied that the Commission has any power, right or jurisdiction to enter any order in regard to the subject matter of this complaint so far as any movements in interstate commerce are concerned. Respondent further, in its answer, says that it now provides all of the facilities mentioned in the complaint that are reasonably necessary for the health, safety and life of its employees.

The answer further states that so far as interstate movements of trains or cuts of cars are concerned, this Commission has no power, jurisdiction or authority to enter any order requiring cabooses for interstate runs between the State of Illinois and the State of Missouri, and respondent, in its answer, expressly raises said question [fol. 3] of the jurisdiction of the Commission so far as any interstate runs or movements are concerned.

Pursuant to notice as required by law, and by the rules and regulations of the Commission, this matter came on for hearing at the offices of the Commission at Chicago, Illinois, on April 27, 1938. Further hearings were held from time to time at the Commission offices at Chicago and at Springfield, Illinois, and the case was marked "heard and taken" on December 7, 1939. Both parties in interest were duly represented by counsel at all hearings in this matter, and introduced evidence, both oral and documentary.

During the course of the proceedings the Commission directed its Chief Railroad Inspector, Mr. R. B. Thomas, to make an investigation of the subject matter of the complaint, to prepare a written report and submit the same to both parties, and to be available to testify and to be cross-examined by either or both parties. The investiga-

tion was made, the report submitted in three sections, and Mr. Thomas testified on direct and cross-examination.

On June 29, 1939, respondent filed its brief on the question of jurisdiction. On July 15, 1939, complainant filed its brief in answer to the brief filed by respondent. On August 4, 1939, respondent filed a brief in reply to said brief filed by complainant.

The evidence shows that East St. Louis is a terminal point for several railroads operating in or through the State of Illinois. Practically every one of these railroads has at least one yard at East St. Louis or in the immediate vicinity thereof. Under the prevailing practice of the in- [fol. 4] dustry, a large volume of business is carried on by the respective railroads among themselves, involving the movement of cars from the tracks or yards of one railroad to the tracks or yards of another, and this results in a large number of such interchanges daily. The territory within which these operations are performed constitutes a switching district.

The respondent herein is engaged in performing terminal services for these various railroads as well as for itself. The respondent itself operates in three principal yards in the East St. Louis switching district which are known as Central District, or C. D. Yard, Madison Yard, and Wiggins No. 2 Yard, as well as in certain subsidiary yards. Interchanges are made to and from these yards either altogether or in part by respondent. In some instances the interchange in one direction may be handled by a railroad other than respondent. In addition to these operations the respondent directly serves certain industries in the East St. Louis switching district.

Each of respondent's aforementioned yards consists of a number of tracks over which the classification or sorting of railroad cars is accomplished. Interchanges received in these yards are classified with reference to the immediate disposition of the particular car, which may be its delivery to a certain industry by respondent or its delivery to a railroad other than the one from which the interchange originated.

The evidence further shows that interchange operations are carried on between St. Louis, Missouri, and the aforesaid three yards of respondent in Illinois via the Eads [fol. 5] Bridge or the Merchants' Bridge. Both bridges span the Mississippi River joining the East St. Louis

switching district with St. Louis, Missouri, and the bridges are approximately three miles apart. The boundary line dividing the State of Illinois from the State of Missouri intersects the Eads Bridge at a point about eleven hundred (1100) feet west of the west curb of Front Street in the City of East St. Louis, and it intersects the Merchants' Bridge at a point about seven hundred seventy-five (775) feet west of the Illinois shore line when the river is at a stage of —2.4 feet.

The evidence further shows that on the Eads Bridge in Illinois there are clearances restricted to such an extent that it is unsafe for a switchman to ride the tops or sides of railroad cars on that portion of the bridge. It also appears from the record that the prevailing lateral clearances on a portion of the Merchants' Bridge in Illinois are such that it is unsafe for a switchman to ride the sides of cars thereon. The vertical clearances on that portion do not permit a switchman to stand erect on the tops of box cars. Some of the interchange movements over Merchants' Bridge by respondent and all of the interchange movements over the Eads Bridge by respondent are presently performed without caboose cars. The evidence further shows that under such circumstances the rear switchman on such interchange movements is compelled to ride on the rear draw bar of the rear car on that portion of the Eads Bridge in Illinois where the aforesaid restricted clearances prevail. On the Merchants' Bridge, however, the rear switchman may ride either the rear draw bar of the rear car or on the top of the rear car in a sitting position [fol. 6] over that portion of the bridge in Illinois where the restricted clearances prevail.

The evidence further shows that at present, in making transfer, delivery or industry runs in Illinois without cabooses to or from its three yards in Illinois, respondent's rear switchmen are obliged to ride either the rear draw bar of the rear car or the top or side of that car; that in so riding the top, side or rear draw bar, the life, health, safety and comfort of said switchmen is endangered by the presence of snow, ice or rain, the inclemency of the weather, the sudden jerk or stop of the train, and the restricted clearances on the bridges. The evidence further shows that such danger would be obviated by the use of caboose cars on these runs.

The evidence is voluminous and varies widely upon the question of time delays, additional cost, and an adequate number of cabooses which would be occasioned by the requirement of caboose cars. From the evidence it appears that there are thirty-nine (39) transfer, delivery and industrial runs made by respondent in Illinois, exclusive of those runs made by way of Eads Bridge or Merchants' Bridge, and exclusive of those runs presently provided with cabooses full time throughout the year. Four (4) of these thirty-nine (39) runs presently operate with cabooses between October 15 and May 1 of each year. These thirty-nine (39) runs vary in length from less than one-half mile to more than ten miles each way within the East St. Louis switching district.

The evidence shows that of these thirty-nine (39) runs there are twenty (20) in which the one-way distance [fol. 7] traveled is in excess of two miles. It further appears that the said twenty (20) runs include the four (4) runs above mentioned that presently carry cabooses from October 15 to May 1. Also, it appears that there is a greater degree of need for caboose cars on the aforesaid twenty (20) runs and the runs via Eads Bridge or Merchants' Bridge than on the remainder of the said thirty-nine (39) runs made by respondent in the East St. Louis switching district. The degree of need is measured by a consideration of a multi-ude of facts, such as the amount of time that would be spent in a caboose if one were provided, the distance that is traveled in making a particular run, the character of the work performed by the crew members, the working conditions, the inclemency of the weather, prevalence of restricted clearances, etc., all of which affect the health, safety, comfort and convenience of the employees.

The evidence further shows that most of the other railroads operating in the East St. Louis switching district under conditions similar to those under which respondent operates, now use caboose cars.

The Commission having given due consideration to the petition, the answer, briefs and all the evidence, both oral and documentary introduced at the hearings in this matter, and being fully advised in the premises, is of the opinion and finds:

(1) that it has jurisdiction of the subject matter of this case and the parties hereto;

(2) that the Terminal Railroad Association of St. Louis, respondent herein, is a corporation engaged in the transportation of passengers and goods as a common carrier in [fol. 8] the State of Illinois, and is a public utility as defined in Section 10 of "An Act concerning public utilities" as amended;

(3) that in and around the City of East St. Louis, Illinois, there exists an area in which a number of railroads perform many of their operations, and which is known as the East St. Louis switching district;

(4) that certain of the railroads, towit: The Alton Railroad Company, The Baltimore and Ohio Railroad Company, the Chicago, Burlington & Quincy Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Illinois Central Railroad Company, the Litchfield and Madison Railway Company, the Louisville and Nashville Railroad Company, the Mobile and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, the Southern Railway Company, the Wabash Railway Company, the Alton and Southern Railroad, the St. Louis Southwestern Railway Company, The St. Louis and O'Fallon Railway Company, the St. Louis and Belleville Electric Railway Company and the Missouri Pacific Railroad Company, operating in or through the State of Illinois, maintain and operate at least one railroad yard in the East St. Louis switching district; that cars in the freight trains arriving in these yards are switched or classified and assembled therein by their own switching crews with reference to the respective routing of the said cars; that deliveries are made of the groups of cars so assembled and requiring transfer to the yards of other railroads;

(5) that the respondent railroad company maintains and operates three principal yards, namely, C. D., Madison and Wiggins No. 2, each consisting of a number of tracks [fol. 9] ranging from ten (10) or less to seventy (70) or more cars in length, as well as certain subsidiary yards, within the confines of the said East St. Louis switching district, and in each of these principal yards, usually six to eight switching crews working in shifts of approximately eight hours each, are engaged continuously in switching, making transfers, and also render direct service to certain industries in the said district when necessary;

(6) that during the process of making certain of the aforesaid transfers, the cars are moved to one or more of the aforesaid respondent's yards, where further classification may or may not occur before final delivery to the receiving railroad has been completed; that delivery, transfer and industry runs consist of groups or cuts of cars varying from one or two to fifty or more cars in number;

(7) that respondent's switching crews assigned to C. D. Yard make transfers between C. D. Yard and the yards of the following railroads: The Alton Railroad Company, The Baltimore and Ohio Railroad Company, the Chicago, Burlington & Quincy Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Illinois Central Railroad Company, the Litchfield and Madison Railway Company, the Louisville and Nashville Railroad Company, the Mobile and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, the Southern Railway Company and the Wabash Railway Company;

(8) that respondent's switching crews assigned to Madison Yard make transfers between Madison Yard and the yards of the following railroads: The Pennsylvania Railroad Company, The New York, Chicago and St. Louis [fol. 10] Railroad Company, the Litchfield and Madison Railway Company, the Alton and Southern Railroad, The St. Louis Southwestern Railway Company, the Illinois Central Railroad Company, the St. Louis and O'Fallon Railway Company, the St. Louis and Belleville Electric Railway Company, the Valley Terminal Railway, and the Illinois Terminal Railroad Company; that in addition, there are industrial runs made out of the Madison Yard, which are known as Granite City East side, Granite City West side and the Granite City combination; and also, deliveries are made by the Madison Yard crews to and from the National Stock Yards;

(9) that respondent's switching crews assigned to the Wiggins No. 2 Yard make transfers between Wiggins No. 2 Yard and the yards of the following railroads: the Missouri Pacific Railroad Company at Dupo, the Illinois Central Railroad Company, the St. Louis Southwestern Railway Company, the Wabash Railway Company, The Baltimore and Ohio Railroad Company-The Alton Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis

Railway Company, the Mobile and Ohio Railroad Company, the Litchfield and Madison Railway Company, the Chicago, Burlington & Quincy Railroad Company and The New York, Chicago and St. Louis Railroad Company; that in addition the aforesaid crews render industrial switching service to the Monsanto Chemical Company, the Phillips Petroleum Company, the Union Electric Company of Illinois (the Cahokia power plant); and also deliveries are made between Wiggins No. 2 Yard and the Madison Yard by the Wiggins No. 2 Yard crews;

(10) that there are two bridges that span the Mississippi [fol. 11] River joining the East St. Louis switching district with St. Louis, Missouri, which are known as the Eads Bridge and the Merchants' Bridge;

(11) that some of respondent's crews are engaged in making transfers of trains to and from respondent's three yards in the East St. Louis switching district and St. Louis, Missouri, by way of the aforesaid bridges;

(12) that all such transfer movements to and from C. D. Yard over the Eads Bridge by respondent are made without caboose cars;

(13) that of such transfer movements over the Merchants' Bridge by respondent bound to or from either the Madison Yard or the Wiggins No. 2 Yard, only one is provided with a caboose car, and that one so provided for only twenty-eight (28) weeks of the year;

(14) that the boundary line between the State of Illinois and the State of Missouri intersects the Eads Bridge at a point about eleven hundred (1100) feet west of the west curb of Front Street in the City of East St. Louis, and it intersects the Merchants' Bridge at a point about seven hundred seventy-five (775) feet west of the Illinois shore line when the river is at a stage of —2.4 feet;

(15) that the governing vertical clearance on both tracks of the Eads Bridge is sixteen feet two inches between top of rails and overhead obstructions; that the governing lateral clearances on the north track of said bridge are six feet five and three-quarters inches to the north of the center line of said track, and seven feet one-quarter inch to the south of said center line; that the governing lateral clearances on the south track are substantially similar to those on the north track;

[fol. 12] (16) that the governing vertical clearance on both tracks of the Merchants' Bridge is nineteen feet nine and

one-half inches; that the governing lateral clearances on the north track of said bridge is six feet nine inches to the north of the center line of said track, and six feet eight inches to the south of the center line of the south track; that the distance between center lines of said tracks on said bridge is twelve feet one inch; that there are no fixed obstructions between the center lines of the said tracks on said bridge;

(17) that railroad cars varying between twelve feet ten inches and fifteen feet in height, and between ten feet and ten feet ten inches in width are moved by respondent over the Eads Bridge; that railroad cars varying between fourteen feet six inches and fourteen feet eleven inches in height, and between ten feet five inches and ten feet ten inches in width are moved by respondent over the Merchants' Bridge;

(18) that the side sway or rock of cars in motion further reduces the existing lateral clearances on the aforesaid bridges;

(19) that the governing clearances on the Eads and Merchants' Bridges are restricted to such an extent that the riding on the tops or sides of cars over said bridges is extra-hazardous;

(20) that one member of each of respondent's crews is required to ride the rear car of all delivery, transfer and industrial runs;

(21) that by reason of this requirement the rear switchman is obliged to ride either on the rear draw bar of the rear car, or the top or side of that car; that respondent's rule forbids switchmen to ride inside loaded open top cars;

(22) that sudden jerks and sudden stops of the train [fol. 13] commonly occur during the course of delivery, transfer or industrial runs; that rear switchmen have been injured by being dislodged and thrown from cars by such sudden jerks and stops;

(23) that during certain seasons of the year, the tops, sides, ends, draw bars, grab irons, and other appurtenances of cars are frequently covered with ice, sleet, snow or rain;

(24) that the presence of ice, sleet, snow or rain on cars as aforesaid contributes to and causes insecurity of footing and uncertainty in grasping and holding on to cars during the making of delivery, transfer or industrial runs;

(25) that without caboose cars, rear switchmen of respondent's crews are openly exposed to inclement weather

in riding the tops, sides, end- or draw bars of cars as aforesaid, and also that, at present, no facility is provided for the storage of safety devices, flagging equipment, lunches, drinking water, extra clothing, or for performing clerical work enroute on delivery transfer or industrial runs not now provided with caboose cars;

(26) that the train line air valve at each end of a car is located adjacent to the draw bar; that in cases of emergency the rear switchman stops the train by opening said valve;

(27) that, because of such location, a rear switchman riding the top or side of a rear car cannot readily or safely open said valve;

(28) that by reasons of the matters and things set forth in findings 18 through 25, inclusive, the physical and mental condition of respondent's rear switchmen is materially adverseiy affected;

[fol. 14] (29) that by reason of all the matters and things hereinabove set forth, the health, safety, comfort and convenience of respondent's rear switchmen is materially affected;

(30) that the furnishing, maintenance, and operation of caboose cars by respondent on its transfer, delivery and industrial runs will provide facilities that will shelter respondent's rear switchmen from inclement weather, afford convenient places for the storing of extra clothing, food, drinking water, first aid kits, flagging equipment and various other devices, eliminate the necessity of the respondent's rear switchmen's riding the tops, sides, ends or draw bars of the rear cars, eliminate the hazards of restricted clearances as they affect respondent's rear switchmen, afford ready and safe accessibility to a train air line valve or the like;

(31) that the furnishing, maintenance and operation of caboose cars by respondent as aforesaid will promote and safeguard the security, safety, health, comfort, and convenience of respondent's rear switchmen during transfer, delivery and industrial run service;

(32) that in view of the distance traveled in making particular runs, the time required to make such runs, the character of the work performed by the crew members, the conditions and circumstances under which the work is performed, the inclemency of the weather, the prevalence of restricted clearances, the necessity of storage facilities and

safety devices, and all the many facts that affect the health, safety, comfort, and convenience of the employees, the degree of need in the cases of twenty of the thirty-nine or more delivery, transfer or industrial runs made by respondent wholly within the State of Illinois, is such as to [fol. 15] reasonably require that a caboose car be provided for each such run throughout the year;

(33) that for the same reasons as set forth in the preceding finding, the degree of need in the cases of the runs covered by findings 11, 12 and 13, is such as to reasonably require that a caboose car be provided for each such run throughout the year.

(34) that it is reasonable to require the respondent to furnish, maintain and operate caboose cars throughout the year on its transfer, delivery and industrial runs, hereinafter grouped by yards. Each such run is identified by its common name:

(1) Central District Yard—
- (a) Pennsylvania
- (b) Mobile and Ohio
- (c) Southern
- (d) Illinois Central

(2) Madison Yard—
- (a) C D Yard
- (b) Granite City east side
- (c) Granite City west side
- (d) Granite City combination
- (e) Alton and Southern-St. Louis and Southwestern
- (f) Illinois Central
- (g) St. Louis and O'Fallon Railway-St. Louis and Belleville Electric;
- (h) Valley Junction;
- (i) Pennsylvania

(3) Wiggins No. 2 Yard—
- (a) Madison Yard
- (b) Dupo
- (c) Illinois Central
- (d) St. Louis and Southwestern
- (e) Monsanto Chemical
- (f) Phillips Petroleum
- (g) Cahokia.

[fol. 16] (35) that it is reasonable to require the respondent to furnish, maintain and operate caboose cars throughout the year on its transfer or delivery runs hereinafter described, in so far as these runs are operated within the confines of the State of Illinois:

(1) All runs into or out of C. D. Yard via Eads Bridge;

(2) Runs via Merchants' Bridge moving into or out out of

(a) Madison Yard;
(b) Wiggins No. 2 Yard;

(36) that the cost of furnishing, maintaining and operating said caboose cars will not impose an undue, unreasonable or unfair burden upon the respondent, considering the fact that said cabooses are essential to promote the security, safety, health, comfort and convenience of respondent's rear switchmen;

(37) that the prayer of the complaint filed herein should be granted to the extent set forth in findings 34 and 35 of this order;

(38) that the remainder of the prayer of said complaint should be denied;

(39) that the motion of respondent to dismiss this proceeding for want of jurisdiction should be denied;

(40) that the motion of respondent to strike from the record all evidence introduced by Chief Railroad Inspector of the Commission should be denied; and,

(41) that the Commission should retain jurisdiction of the subject matter of this proceeding and the parties hereto for the purpose of entering such further order or orders as it may deem meet.

It Is Therefore Ordered that the Terminal Railroad Association of St. Louis, respondent herein, be, and it is hereby, [fol. 17] required and directed to furnish, maintain, and operate caboose cars on its transfer, delivery and industrial runs, more specifically set forth in finding 34 of this order within sixty (60) days of the date of service of this order.

It Is Further Ordered that respondent herein be, and it is hereby, required and directed to furnish, maintain, and operate caboose cars on its transfer and delivery runs more

specifically set forth in finding 35 of this order within thirty (30) days of the date of service of this order.

It Is Further Ordered that the motion of respondent to dismiss this proceeding for want of jurisdiction be, and the same is hereby, denied.

It Is Further Ordered that the motion of respondent to strike from the record all the evidence introduced by the Chief Railroad Inspector of the Commission be, and the same is hereby, denied.

It Is Further Ordered that the respondent shall make report in writing within five days after the caboose cars have been provided on the runs as required by the terms and conditions of this order, and shall mail such report or reports to the Secretary of the Commission.

It Is Further Ordered that the Commission hereby retains jurisdiction of the subject matter of this proceeding and over the parties hereto for the purpose of entering such further order or orders as it may deem meet.

By order of the Commission at Chicago, Illinois, this 1st day of February, 1940.

(Signed) Joseph E. Knight, Secretary. (Seal.)

[fol. 18] *Dissenting Opinion of Commissioner Olson*

By Commissioner Olson:

The order adopted requires cabooses to be attached to train movements, not only in the State of Illinois, but also to such train movements as use the Eads and Merchants Bridges between the States of Illinois and Missouri. I do not concur with that part of the order which requires cabooses to be attached to trains moving between the States of Illinois and Missouri. While the order is limited to the movement within the State of Illinois, it is careful to mention the number of feet on each bridge from the Illinois side which it considers to be within the territory of the State of Illinois. It is impracticable for a caboose to be attached to a train of cars and proceed only to what the order considers the Illinois limit, because such caboose, by the very nature of the operation, must continue on to the State of Missouri, and therein occupy part of the railroad yards in that state. It is equally true that cabooses must be attached in the State of Missouri to trains originating there, destined for Illinois and routed over the said bridges. This order not only interferes with interstate commerce, but directs what must be

done in another state wherein the transportation movement destined for this state, begins. Another observation clearly shows the interstate character of this operation, for while the caboose might be in one state, the locomotive drawing the same may very well be in the other.

The courts frequently have considered the power of a state to regulate railroad movements. In Chicago, Rock Island & Pacific Railway Company *vs.* Arkansas, 219 U. S., [fol. 19] the right of the State of Arkansas to enact a Full Crew Law was challenged. As the law operated solely with the boundaries of the state, its constitutionality was upheld. On the other hand, in A. T. & S. F. Ry. *vs.* La Prade, 2 Fed. Sup. 285, an act of the State of Arizona limiting the number of cars in one train movement was held unconstitutional, because it placed an undue burden upon interstate commerce, in that such limitation directly interfered with such commerce. The court pointed out the effect of such limitation law upon an east-bound train, leaving a point in California, consisting of eighty to one hundred cars or more, being hauled to a division point west of the boundary of Arizona, and there broken up into shorter trains of seventy cars or less in order to comply with the Arizona Law, and again upon leaving the State of Arizona being re-formed into a train of eighty cars or more. In order to form such train of eighty cars or more at least two separate movements of an interstate train would be necessary in the State of Arizona.

The City of Covington, Kentucky, passed an ordinance limiting the number of passengers using street cars in said city. The validity of this ordinance came before the Supreme Court of the United States in South Covington Railway Company *vs.* Covington, 235 U. S. 537. The Company operated street cars from the city of Covington in the state of Kentucky into the city of Cincinnati in the state of Ohio. In so far as this ordinance attempted to regulate the movement of cars in interstate commerce, it was held inoperative. In so holding, the court in part used the following language: "We think the necessary effect of these regula- [fol. 20] tions is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railways in

many instances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and the interstate business might be impeded by conflicting and varied regulations in this respect with which it might be impossible to comply. On one side of the river, one set of regulations might be enforced, and on the other side quite a different set, and both being practically a continuous movement."

If Illinois has the power to adopt rules and regulations affecting train movements from this state to Missouri, Missouri surely has like power to do the same, which may result as stated in the case last cited, that on the one side of the river there may be one set of regulations, and another set on the other side. In my opinion the order adopted, in so far as it relates to movements over the bridges mentioned, invades the field of federal regulation, and is an unconstitutional interference with interstate commerce. While the agencies of the state and nation should be alert in the exercise of their respective jurisdictions, neither should attempt to invade the exclusive field of the other. The legislature of our state recognized the foregoing principle, for Section 90 of the Public Utilities Act states the following: "Neither this Act nor any provision thereof shall apply or be con- [fol. 21] strued to apply to commerce with foreign nations or commerce among the several states of this Union, except when specifically so stated, and insofar as the same may be permitted under the provisions of the Constitution of the United States and Acts of Congress, and the decisions of the Supreme Court of the United States."

It may be urged that the foregoing legislative declaration merely states the law, still it must be considered as a direction to the agency created by the Act, to obey its terms.

I am in full accord with the aims and purposes of the order, but withhold concurrence with that part thereof which concerns movements over the bridges in question because I believe the same to be an attempted regulation of interstate commerce and beyond our jurisdiction so to do. The end sought is worthy and admirable and almost persuades the exercise of such authority, yet a proper regard for the respective jurisdictions of the state and nation requires the exercise of restraint. I concur in all of the other provisions set forth in the findings and order.

(Signed) Andrew Olson, Commissioner.

Certificate of Secretary of Illinois Commerce Commission.

Appearance of Illinois Commerce Commission in the Circuit Court of St. Clair County by John C. Cassidy, Attorney General, State of Illinois, Harry R. Booth of Counsel, filed April 4, 1940.

Motion of Terminal Railroad Association of St. Louis to suspend operation of order of Illinois Commerce Commission, filed in the Circuit Court of the County of St. Clair on April 9, 1940.

[fol. 22] ORDER POSTPONING EFFECTIVE DATE OF ORDER OF COMMISSION

Order entered in Circuit Court of the County of St. Clair ordering that the effective date of the operation of said order of the Illinois Commerce Commission entered in said cause on February 1, 1940, be postponed to the date when this Court shall enter its final order, and ordering said Terminal Railroad Association of St. Louis to file within ten days from said date, a suspending bond in the penal sum of $1,000.00.

Suspending Bond of Terminal Railroad Association of St. Louis in the sum of $1,000.00, dated April 15, 1940.

Transcript of record of Illinois Commerce Commission, No. 26601, filed in the Circuit Court of St. Clair County on April 17, 1940.

COMPLAINT

Complaint filed by Chairman and State Legislative Representative, Brotherhood of Railroad Trainmen of Illinois, on March 4, 1938, before Illinois Commerce Commission, alleging as follows:

That Terminal Railroad Association of St. Louis, Respondent herein, is a Public Utility, and that as such Public Utility said Respondent is subject to the provisions of an Act to provide for the regulation of Public Utilities.

That the post office address of Respondent is Union Station, St. Louis, Missouri.

That said Respondent has failed to provide caboose cars for switchmen in the territory in, around, and about East St. Louis, Illinois, and as a result thereof switchmen in the performance of their duties on transfer trains are necessarily required either to ride on the draw bar, in between

freight cars, or on the top of, on the side of freight cars where numerous reduced vertical and horizontal clearances [fol. 23] prevail, thus endangering the life, health and safety of the aforesaid switchmen, of transfer cars and of other employees of the said Respondent and of the public within the State of Illinois.

Wherefore, Complainant prays that the Respondent may be required to answer the charges herein, and that upon a final hearing hereof, the Commission will make such order in the premises as may seem meet.

March 4, 1938. Copy of complaint mailed to attorney for respondent, St. Louis, Mo.

March 4, 1938. Cause set for hearing March 22, 1938 at Springfield and parties advised by letter.

March 19, 1938. Order continuing hearing to April 14, 1938 at Chicago and all parties advised by letter.

April 6, 1938. Order continuing hearing April 27, 1938 at Chicago and parties advised by letter.

April 6, 1938. Answer of Respondent filed.

ANSWER

Answer of Respondent, Terminal Railroad Association of St. Louis to the Complaint, as follows:

Now comes Terminal Railroad Association of St. Louis and for answer as to the complaint in said cause says:

1. It admits the allegations of paragraph 1 of the complaint.

2. It admits the allegations of paragraph 2 of the complaint.

3. It admits the allegations of paragraph 3 of the complaint so far as said act is applicable to said respondent, [fol. 24] and to the movements, facilities, etc., involved in this complaint, but it expressly denies that this Honorable Commission has any power, right or jurisdiction to enter any order in regard to the subject matter of this complaint so far as any movements in interstate commerce are concerned.

4. It admits the allegations of paragraph 4 of the complaint.

5. It denies the allegations of paragraph 5 of the complaint and says that it now provides all of the facilities mentioned in said paragraph for its employees that are reasonably necessary for the health, safety and life of said employees.

6. For further answer to the complaint this respondent expressly says that so far as interstate movements of trains or cuts of cars are concerned, this Commission has no power, jurisdiction or authority to enter any order requiring cabooses upon interstate runs between the State of Illinois and the State of Missouri, and this respondent expressly raises said question of jurisdiction of the Commission so far as any interstate runs or movements are concerned.

Having fully answered respondent prays to be discharged.

April 27, 1938. Case called and heard by Examiners Daley and Nyka, who were assigned to receive evidence, and continued to May 19, 1938 at Springfield for further hearing.

Statement of Evidence

Transcript of testimony taken before Don Daley and Leon C. Nyka, Examiners having been designated by the Commission to conduct the hearing in the above entitled cause.

[fol. 25] APPEARANCES: MR. A. A. SCHWARZBACH AND MR. RICHARD ABRAM, ON BEHALF OF THE BROTHERHOOD OF RAILROAD TRAINMEN. MR. BRUCE A. CAMPBELL, ON BEHALF OF THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

CHARLES J. JENKINS, witness on behalf of petitioner, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schwarzbach:

My name is Charles J. Jenkins. I reside at 5081 North Kings Highway, St. Louis. I am employed as a switchman by the Terminal Railroad Association of Illinois, and I have been employed by them since June 6, 1920. I am not

employed in active work at this time. I have been on leave of absence since March 1, 1936; the last day I worked was February 28th. I occupy the position of Chairman of the General Grievance Committee for the Brotherhood of Railway Trainmen on the Terminal Railroad Association of St. Louis.

I am familiar with the various runs of the Terminal Railroad Association of St. Louis in and around East St. Louis, Illinois. The East St. Louis switching territory, generally, is composed of railroad yards at Madison, Illinois, lying partly, I believe, in Venice, Illinois, and what is known as the C. & D. East St. Louis, Illinois Yards, the Ice House, the Relay Station at East St. Louis, the Wiggins number 2 Yard, what is known as east side Wiggins, the headquarters of which yards are 621 North Front Street, East St. Louis, Illinois. In number 2 Yard there is a number of crews man- [fol. 26] ned by switchmen. They handle transfer deliveries to and from the various trunk lines' connections, switching to various industries in and about number 2 Yards, and on what is known as the main line to Falling Springs, Illinois, there is a number of industries also served along that line and they handle transfer deliveries to C. & D. Yards to Madison, Illinois and yards in East St. Louis, mostly all in the Terminal Association, as well as to Dupo. the Missouri Pacific Yards, which is about 12 miles, possibly 13 miles north of number 2 Yard. The C. D. Yard has a number of switching crews manned by switchmen that switch the icehouse, making deliveries to and from all of the various Trunk Line connections to the Terminal, handling transfers between Madison, Illinois and C. D. Yards west of number 2 Yards, and at Madison, Illinois, there are also a number of switching crews that serve the many steel companies and other industries in and about Granite City and make deliveries to the various Trunk Line connections to the Terminal, and also switch industries on the Illinois transfer between Madison, Illinois and Valley Junction, Illinois, and, of course, in all of these yards mentioned all the crews make up and break up trains and serve a general service that is rendered by such crews. There is a number of specific runs in each district that is designated to go to and from certain places.

Number 5 Yard is about one mile south of number 2 Yard; it also belongs in the East St. Louis switching dis-

trict and it is under the jurisdiction and the management of the number 2 Yard.

All of these runs are within the State of Illinois.

[fol. 27] I would say I have been connected as switchman in transfer service throughout the entire district in which I was employed.

A switchman is assigned to a particular crew and each switching crew has a foreman, who is also a switchman and the switchmen work directly under the foreman. The foreman gets his instructions from the supervisory officials, usually the Yard Master or the Assistant Yard Master. They make and break up trains in the yards, switch industries, make deliveries from connections to the Terminal from through lines and make transfer runs from and to various yards of the Terminal Association and when they are working in yards or in industries making up trains, switchmen have to couple cars together and see that the air brakes are coupled and in order on the train, and when a train leaves a yard for a destination the head man takes his position on the fore part of the train and the conductor takes his proper position on the train and the rear man takes his position on the rear car of the train where he can, without being knocked off; he rides the top of the car if it is a high car, I mean by that a box car, and on the Eads Bridge runs——

Objection by Mr. Campbell.

Examiner Nyka: In view of the fact that we cannot reach any agreement, we might as well go ahead and then we will rule at the proper time.

The Witness: The rear man is required to ride the rear coupler of the car due to overhead and side structures not clearing the man on top or side of the car. A number of such structures are within the State of Illinois. The rear [fol. 28] man lines all switches back for proper position when they have been used by his train and in the case of reverse movement, when a train is shoved, he is required to protect street and highway crossings to keep the public from being killed or injured, and when shoving a train right near by or on private crossing he is required to be on top of the rear car when he can, unless he is prevented by overhead or side structures that do not clear the man.

I think I have given pretty thoroughly the general duties of a switchman; that is what I assume the Commissioner wanted to know.

I only mentioned the Eads Bridge, but the testimony that I gave was only to runs within the State of Illinois. We also have runs that leave Illinois and come back into Illinois over the Merchants Bridge. Now that bridge has clearances that will not clear a man on the side of a car and only on top of a car by stooping down very low, and I am referring to box cars. The Merchants Bridge is strictly a railroad bridge while the Eads Bridge has a roadway deck above the railroad deck and the clearances on the Eads Bridge are, overhead, very much closer than on the Merchants as well as on the side.

A "cross-over" is a track that is put in, connecting two tracks together, connected at each end with switches so that they can be lined to put a train from one track over to the other. There is a "cross-over" on the bridge; the Merchants Bridge, about, I would say, about 700 feet or approximately 700 from the water line in Illinois where it is used to transfer trains from one track to the other when [fol. 29] necessary and on the Eads Bridge there is a crossover, but I am not certain as to whether it would be within the State of Illinois or not, but it is my opinion that there is a crossover there, in the State of Illinois. Yes, and I think it would be—it is close to the borderline, if I recall correctly. It would be possible to put crossovers on these bridges in the State of Illinois.

There is a double main line which consists of two tracks on each bridge approach in the State of Illinois.

The minimum number of switchmen now used in a single crew is three, and the maximum is five. The minimum number of switchmen did not include the fireman and engineer.

A caboose is a railroad car furnished for the housing of train crews and equipped for their safety. It provides a place for them to keep and carry their necessary flagging equipment, clothing such as rain clothes, coats and so forth; to carry their lunches and necessary first aid equipment. It can be used by them to take their meal periods in and a place for the crew to do any necessary clerical work that has to be done when the train is en route. They are needed to avoid side and overhead structures which en-

dangers the life and limb of the switchman and to provide for them a safe place, or I would say a safer place in case of derailment of the train or sudden jerking or sudden stopping which would be liable to throw them from the top or side or end of a car. In case a train were broke in two it is very dangerous for a man to be on the rear end of the train on the outside and it is easy to be knocked off the top or the end by a sudden jerk or stop. It also protects the switchmen from the inclement weather, both [fol. 30] winter and summer, and leaves them in a better position to physically perform their duties, and the crew, or I will say the switchman, can observe his train better while it is en route, which is necessary, for him to watch the side of his train for anything that might be the matter that he can see and it is difficult for a man on top of a car or on the end of a car to observe the side of his train and it is very hazardous if he attempts to. During the winter months we have lots of snow and ice and it makes the hazard greater for the men on top or the side or the drawbars of cars that is on the rear end of the trains and makes it easier for them to be jerked off or bumped off or fall off, and the hand-holds and sill steps of cars are covered with ice in the winter on numerous occasions which makes it difficult for a man to get on top of a car and he could protect the public and himself better with a caboose, because he has some place to carry all the necessary equipment and flagging paraphernalia which would protect his train from being struck by another and in shove movement which is necessary in many instances, a caboose properly equipped with a whistle and a conductor's valve inside, would give the switchman on the rear end of the train practically the same control of the train that the engineer has with reference to stopping or sounding a warning signal on approaching a highway crossing and so forth.

I believe a switchman could perform the necessary duties better from a caboose, because in observing the running condition of his train and in flagging, which is required, and in getting off and on the rear end of his train, in moving motion, which is necessary, and any other work [fol. 31] that might be necessary for him to perform, I think that the caboose would be an asset to him and in shoving or back-up movements of trains. Personally from my own experience many a time I have had to stand on

the top of the last car in the train while shoving, and facing sleet and snow and rain storms and wind until I could not see where we were going, and it was necessary in many instances to turn your back for shelter, and just occasionally maybe you could look and see where your train was going to or what was ahead of you. You could not observe highway crossings or other dangerous points as well as you could if you were equipped with a caboose that is properly equipped.

By the use of the caboose it would not be necessary for the head switchman to ride on top of the head car or the head end of the train. The conductor could ride in the caboose also.

A "reverse movement" is where a train is backed up and the engine pushes the train back instead of pulling it. We have a number of "reverse movements" in the State of Illinois.

Cross-examination.

By Mr. Campbell:

The Eads Bridge and the Merchants Bridge are both used for passenger and freight trains. The bridges span the Mississippi River from Illinois to Missouri. The tracks on the two bridges are termed as main line tracks within the switching district of St. Louis and East St. Louis.

I would not say that there would be any extra time required if a caboose was used on these runs. I am assuming that it would be a managerial question as to the time re-
[fol. 32] quired to get the caboose to the proper place and to couple it on the cut and uncouple it at the end of the run and get it to the proper place. I do not believe it would slow up the work fifteen to twenty per cent. I do not think it would slow up the work or cause any delay. I do not think it would cause considerable extra expense for the time of the men to make these movements. It might take a little time, but it is up to your supervising officials as to how much time it would take.

Mr. Schwarzbach:

Q. Mr. Witness, a caboose when assigned, is so assigned at the very beginning, and therefore, isn't it true that you keep your caboose throughout the entire trip?

The Witness: That is right, generally speaking.

LESLIE W. CHEATHAM, witness on behalf of petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Schwarzbach:

My name is Leslie W. Cheatham. I reside at 1815 4th Street, Madison, Illinois. I am a switchman, Terminal Railroad Association of St. Louis, since May 20, 1920. I am on the run known as the transfer Dupo run in the State of Illinois. I have had that run about a year. I have been on various industrial runs off and on since I have been employed by the Terminal. I report for duty on the transfer run at 11:00 o'clock at the Madison Yard, Madison, Illinois. We get our train ready and couple up the air. We look over the air, to see the air is in working order, and the brakes are working, and we have all the way from 30 to 144 cars on this run. We pull out of the C. T. [fol. 33] Junction out of Madison Yard, over the Illinois Terminal tracks, Nickel Plate, the I. C., and operate on the Illinois Terminal, also the highway leading from National City to Route 67. There is no kind of cross protection there, and we cross the Willow's Tower, cross 9th Street in East St. Louis, no crossing protection. 15th Street has a crossing watchman and gates. We stop at the L. & N. Railroad crossing, cross the St. Clair Avenue, which is protected by fixed signals, we cross the overhead structure of State Street, we cross the Bellville Electric Railroad which is protected by a gate, and from the Bellville Electric Railroad we cross Ridge Avenue, protected by six fixed signals. We cross Illinois Avenue, a crossing watchman. We cross St. Louis Avenue, which is unprotected. We cross Missouri Avenue, which is protected by a crossing watchman, and we reach a point in the Southern Tower, where we have a connection known as the Southern Railroad for the American Steel Foundry, and a good many times we make a set-out. We cross the Southern crossing across Broadway, which is protected by a crossing watchman. We cross Missouri Avenue, protected by a crossing watchman. Market Street, which is a paved highway unprotected. We reach Valley Junction, where we make deliveries to the I. C., the B. & S. and Cotton Belt. We cross the interlocking plant at Valley Junction, cross the Southern Railroad, the Illinois Central Railroad, and the Mis-

souri Pacific Main line. We go through a town called Maplewood, Illinois, and we have to cross unprotected. We reach the north Dupo Tower, cross the Illinois Central Railroad again and proceed to South Dupo, head into the [fol. 34] South Dupo Yard, known as Road Yard, and we go over the F. Yard, and there is a train in Dupo for Madison. We pull out of F. Yard by road track, and there are two more small Yards, the Missouri-Pacific, the North Dupo. We get our route at North Dupo Yard, and return on the same route back to Madison Yard. We have the use of a caboose on this run the entire year, winter and summer.

We take a train out of Madison to Granite City. We cross various industries out of the Madison Yard over a street known as Market Street, protected by a crossing watchman. We go to Granite City north out of Madison through the interlocking plant, cross the Illinois Terminal Railroad over to a switch out of the interlocking plant, we shove down to what is known as 15th Street Belt. Shoving down to 15th Street Belt, there is a short curve downgrade to a building known as the National Enamel Stamping Company. We shove down 15th Street Belt, and the rear man or fore man never sees the head men within forty-five car lengths until he gets on the straight railroad, and we have State Street, protected by fixed signals. We cross the Illinois Traction Railroad unprotected. We cross Madison Avenue and the Illinois Terminal Railroad, which is protected by fixed signals to the public, none for the railroad, to the industry called Granite City Steel Company of Granite City, which uses this railroad for switching. We have four switches to line, we shove by Granite City Steel Company plant to the St. Louis Coke and Chemical connection, shoving down the railroad, which is very hazardous. We shove down, and cannot see. The [fol. 35] head man cannot see the rear man or fore man. I have had cars break off and roll down this belt, and it was impossible to stop them by hand brake. I have been on that run, and had to run ahead of the cars to protect the public. That covers the entire Granite City route. We do not have air brakes and couplings on these runs all the time.

A shoving movement is a reverse movement shoving the cars ahead of the locomotive.

A number of hazards mentioned could be eliminated. If we had a caboose on this run with air brakes properly working, the conductor or the rear man would be able to stop in case of emergency. It has what is called the conductor's valve on the caboose.

The industrial crews of the Granite City Steel Company work in this territory. They come out on our main line. I have been compelled to make short stops because of industrial crews working on many occasions. I do not have any caboose on the Granite City run.

The Wabash run on the Madison Yard is known as the Wabash deliver, Madison Yard to Brooklyn, Illinois. We get a train out of the Madison Yard and go to the C. T. Junction, shove our cars to the Wabash Railroad to Brooklyn. We shove over this track and there is a railroad approach north of this railroad crossing, Venice, Illinois to Brooklyn, Illinois, which is a very hazardous crossing. We are unable to see until we get within fifty feet of the crossing. The crossing is protected by a fixed signal. We cross the crossing from Venice, Illinois, to Brooklyn, Illinois, that has a crossing watchman twelve hours a day. We cross [fol. 36] the Southern Railroad in to the Wabash connection. We are not equipped with a caboose or tail hose on this particular run. The hazards mentioned could be eliminated by having a caboose on this run, for the same reasons as mentioned with reference to the Granite City run.

With reference to the Rose Lake delivery run, we take a train out of the Madison Yard and cross the I. C., the Illinois Terminal and Nickel Plate Railroad, we cross the public highway leading from National City on Route 67. We cross Willow's Tower, and enter into the Pennsylvania Yard, and pass over the inspection pit, which sometimes requires thirty to forty minutes going over this pit. The rear man is looking out on a box car, and in the wintertime there is snow and ice, and in the summer time, rain. A good many times we have to shove back over this pit and take a second trip over.

We have no caboose on this run. The hazards mentioned could be eliminated by the use of a caboose with properly equipped conductor's valve on this reverse movement.

On the transfer run from Madison to Valley Junction, we get a train out of there that consists of three to four deliveries. We cross the C. T. Junction, the Illinois Central tracks, the T. C. and Nickel Plate. We cross the highway

leading from National City to Route 67. which is unprotected. We cross the Willow's Tower, Pennsylvania and B. & O. Railroad, which has an interlocking plant. We cross 9th Street unprotected by any signal. We cross 5th Street protected by crossing watchman. We have a complete stop at the Illinois Central Railroad. We cross St. [fol. 37] Clair Avenue, protected by a fixed signal. We cross State Street overhead. We cross the Bellville Electric Railroad, protected by gates against the Bellville Electric Railroad. We cross Ridge Avenue, protected by fixed signals. We cross St. Louis Avenue, unprotected. We cross Missouri Avenue, protected by crossing watchman. The Southern crossing, where we make a delivery, we cross Broadway, protected by a crossing watchman. We cross Missouri Avenue, protected by a crossing watchman. We cross Market Street, which is unprotected, and arrive at Valley Junction. and we set out to the Alton and Southern, the Illinois Central and Cotton Belt Railroad. A good many times we have to make a reverse move en route to set out various industries. We get our train out of Valley Junction, back to Madison Yard by the same route.

We are equipped with a caboose on this run for six months of the year, from October 31st to May 1st. We are not equipped with a tail hose on this run at any time.

The crossings mentioned are over main lines at switch tracks.

These hazardous conditions could be eliminated by the use of a caboose properly equipped with conductor's valve, in the case of reverse movement to protect the public as well as the employes. All of the runs mentioned are in the State of Illinois.

We have an industrial crew out of Madison Yard. This crew has all the way from forty to seventy five cars, whatever may be on the tracks. They leave the Madison Yard, known as the Illinois transfer. We cross the I. C., Nickel [fol. 38] Plate, Illinois Terminal Railroad. We cross the highway from National City to Route 67. We cross through the Willow Tower interlocking plant of the Pennsylvania and B. & O. Road. We cross 9th Street, we cross the L. & N. Railroad, known as Winstanley at grade, and start again switching to industries of the Illinois transfer over St. Clair Avenue, which is protected by fixed signals. State Street, overhead, Ridge Avenue, protected by fixed signals, and then over St. Louis Avenue, which has no protection; Mis-

souri Avenue and Market Street, unprotected. We go down the railroad, which is called Church Street, from the Southern crossing, switch to various industries, the Southern crossing to 10th Street, East St. Louis. We cross 15th Street, which is a very hazardous crossing, unprotected. We return via the same route up to Madison. This crew works eight to ten hours.

These roads that we cross are all heavily traveled.

We have a caboose on this run at the present time, for six months of the year, the winter months. We are not equipped with a tail hose.

Many of the hazards mentioned could be eliminated if we had a tail hose or conductor's valve on the caboose and a caboose all year round.

I worked on the old bridge run to Madison, Illinois. We cross the Southern Railroad, cross the highway leading from Brooklyn, Illinois, to Route 67, cross the Nickel Plate Railroad to Brooklyn Junction, the Wabash Railroad, and we cross the highway that goes from National City to Route 67, and arrive at East St. Louis. We get a train out of East [fol. 39] St. Louis for Madison via the same route. Pulling out of this Yard in East St. Louis we have three switches to line back across the public highway coming out of East St. Louis, which is sometimes dangerous, and the rear man when we try to go over this crossing in the wintertime, when there is ice and snow on the cars, it is dangerous.

The Sante Fe is heavily traveled. We are not equipped with a caboose nor a tail hose.

All of the runs mentioned are within the State of Illinois.

Other railroads operating runs parallel with our railroad operate with cabooses, and they have it the year round. They are the Pennsylvania, the run from Rose Lake to the Madison Yard. The I. C. comes up that way and they have a caboose. The C. & E. I., Madison, Illinois, to East St. Louis, on our railroad has a caboose. The Rock Island, Madison Yard to East St. Louis has a caboose. The C. B. & Q. has a caboose when they come up to the Madison Yard, or the C. T. Junction. The Illinois Central has a caboose, the Big Four has a caboose from East St. Louis to Granite City, Illinois. The Alton Railroad has a caboose out of Venice to various Yards where they go.

These runs I mentioned, from my own personal observation, are similar to runs that we have.

A switchman is assigned to a crew to have four men, and he has to make up and break up, couple trains and make various transfer deliveries; also he uses the pilot to see that his trains are properly equipped with air, and he has to go in to make the deliveries.

A caboose is a car equipped for the purpose of trainmen, [fol. 40] housing purposes for the operation of the train, and it carries flagging paraphernalia, lunch, train clothes, also any clerical work the foreman might have to perform, and it is also used for the same operation of a train in reverse movement, and it houses the switchman in inclement weather, winter or summer.

We stick our lunch in our pocket, or probably tie it on us if we can find some place to tie it when we haven't any caboose.

A switchman can perform his necessary duties from the caboose by having a place to ride on the rear end and it keeps him out of all kinds of weather. You can look over the train much better, also protect the public in case of emergency.

We have sleet and snow in this district in the winter months.

The caboose equipment protects the men from overhead or side clearances on account of reduced clearances. In many instances the signals and overhead structures and clearances are along the side of the track where we have industrial crews. Now I ride in the caboose.

Cross-examination.

By Mr. Campbell:

Yes, the run from Madison to Granite City, the Granite City run, is an industrial run where we do industrial switching along the line.

I do not know offhand how many industries we serve in the run from Madison to Granite City. It has been over five or six years since I was on that run. I did run last September, a year ago. That was the last time I was on that run. The condition of that run is practically the same [fol. 41] now as it was then. I think the record shows I was on that run in 1936. I have been to Granite City at various times. I do know of my own actual knowledge about this run. I made a thorough investigation. I would say there

are approximately twelve industries on the run from Madison to Granite City. The distance is approximately two or two and a half miles.

The industrial cars are switched in and out of different plants. We do not have the air coupled up.

In order to make a caboose available for the elimination of hazards that were mentioned, you would have to have it coupled up. This would apply on all of these runs so far as the air is concerned, if you have your air on, all of the other runs, with the exception of this run. They do not carry any on this run.

The Granite City Steel Company has a separate lead of its own, but they use our lead, and we work on it.

The Wabash delivery is about a mile and a half. That is delivery from the Madison Yard to Brooklyn, Illinois. It is a continuous run.

The Rose Lake run is approximately three miles. The time for this run is usually different, some fifteen, some a half hour, some twenty minutes.

We have a caboose on the Cotton Belt during the winter months, from October 31 to May 31st.

On the industrial crew out of the Madison Yards we have a caboose for six months of the year. The air is coupled up on that industrial run between switching.

[fol. 42] The old bridge run is from a point where that starts in the Yard, I would say approximately two and one-half miles. There is a stop a good many times at the National City and National Stock Yards on this run.

Redirect examination.

By Mr. Schwarzbach:

The use of a caboose would help to eliminate the hazards of reduced overhead or reduced side-clearances.

I made an investigation of the Granite City run since September 1936 for the purpose of testifying here. I was up there along about the 10th of March, this year.

Direct examination.

By Mr. Abrams:

We cross the Illinois Terminal Railroad, the steam road, and the Illinois Terminal electric line on the Granite City

run. We operate there over both railroads. The air brakes were coupled roads.

Cross-examination.

By Mr. Campbell:

We do not come to a complete stop at those roads.

I make the Wabash delivery run practically every other day. Occasionally I would have nothing to do, and they put me on the delivery. I make the Rose Lake run and the transfer run every night. On the industrial run, I go there over the same track, the same route the industrial crew goes over. I would say that I make the old bridge run approximately once a month.

[fol. 43] William O. Satterfield, witness on behalf of complainant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schwarzbach:

My name is William O. Satterfield. I reside at 948 North 47th Street, East St. Louis, Illinois. I am a switchman for the Terminal Railroad Association of St. Louis. I have been employed there for more than fifteen years. My regularly assigned job now is the hind end of the second delivery, known as the hind end of second delivery on the second shift, from 3:00 to 11:00 P. M., at the C. D. Yard, East St. Louis. I have been on that particular assignment about four months. I report for duty at 3:00 o'clock P. M., at the C. D. Yard office.

My duties on this job are the hind man of a crew that consists of foreman and two helpers. Our usual routine of work is starting at 3:00 o'clock P. M., making the Illinois Central deliveries from the C. D. Yard in East St. Louis to the 6th Street Yards, the Middle Yard of the Illinois Central. We are assigned to our duty by the Yard Master at Cabin 1, to get the cars on Track 25, which is a classification track for the Illinois Central, and working up this train, coupling up this train, working the air on the train. We get clearance from the Train Dispatcher at

the Q Tower, opposite the Relay Depot. It gives us clearance out of this Yard to what is known as Track 17 or 18. Clearance on the first signal is a pot signal located about 300 feet north of the B. & O. crossing, which is known as the B. & O. crossing. That signal is green, which has been [fol. 44] replaced by an overhead bridge signal north of the B. & O. crossing, which has been in operation I would say for a period of a year. This bridge signal there has no signal on it, and the replacement of the pot signal on the ground. There is insufficient clearance on this bridge for a man to ride the top of the rear car, which he is compelled to do under the rules of the Terminal Railroad Association.

We proceed over the B. & O. crossing to another signal, a bridge signal, which has insufficient clearance for a man to ride on the top of the train without being in a stooping position, or bending position, on the train.

Then we enter into the interlocking switches on the plant known as the Q Tower. We are routed up Track 18 out of the C. D. Yard.

There is a bridge signal located about fifty feet south of Missouri Avenue, which has insufficient clearance for a man to ride the side of the car without being knocked off the car.

After passing this bridge signal, we cross what is known as the detour of Broadway. We proceed up an incline where there is being built a subway on Broadway Avenue. It is a very steep incline, making it impossible in case the rear end of the train was bumped off to be able to apply hand brakes to avoid serious injury or probable loss of life of the public. It is used, this detour of Broadway, by a very heavy traveled street by pedestrians and trucks which go into St. Louis, Missouri.

After going over this incline on Broadway where this subway is being built, we proceed down what is known as [fol. 45] the southbound Illinois Central Main Line to a distance of about a quarter of a mile, where we come to a switch on the right-hand side of the track, which is located there for the purpose of transferring us off from this main line onto an auxiliary track.

In transferring us off of this main line onto the auxiliary track at the switch, we throw to the opposite end of the crossover to a track that is used by the Illinois Central Railroad going down to what is known as their

house job. At various times these engines working this house down there are compelled to use this same switch, which is protected by gates.

Then we cross under an underpass known as the approach to the Free Bridge, the Municipal Bridge. We start up a grade. After we get nearly to the top of this grade, we cross a street known as Trendley Avenue. In crossing this street, the rear end of the train is on an incline. If broken off without any protection for the hind end of the train with the exception of hand brakes, it is very difficult to stop these cars and avoid loss of life to pedestrians who use this street.

In crossing 6th Street, there is no protection there in regard to flagman or gates or anything to that effect that would afford us any protection for the head end of our train in approaching this street.

We return back to 6th Street over the Illinois Central northbound main line, and at this 6th Street—in making this return movement there is an icehouse located about thirty feet from the track which compels us to move under very cautious signal there in regard to the lives of people who cross the crossing at 6th Street, as they have no watch- [fol. 46] man there at 6th Street to protect this crossing.

We proceed down to Trendley Avenue. Upon different occasions we are requested to work an industry there which is known as the Elliott Switch & Frog Works. We switch across Trendley Avenue without any protection there of flagman or crossing watchmen across this street. It is a very hazardous condition to work under there, what is known as Trendley Avenue.

At all times, we are under instructions to stay in the clear of the main line, which leads off from the northbound of the IC tracks practically on top of the subway that is being built at Broadway.

After we get our clearance at Broadway, we enter the plant and cross over a track which is known as the L & N House Track. The L & N switch engine is doing work across this crossing in and out of their Yards to the house located about 300 yards west of this crossing.

At this crossing, the L & N isn't protected by any stop signal, and our crews, in approaching this crossing, are on an incline.

We proceed about twenty-five feet further north and come to this bridge signal located across what is known as No. 1 and No. 2 tracks, coming off from the hill out of St. Louis. This bridge signal clearance to the engines is very insufficient, which would make it impossible for a man to ride the side of a car by this signal without being knocked off.

Crossing Missouri Avenue we come to a pot signal located on the right-hand side of the track going north, which governs the moves down Track 18. On the left-hand side [fol. 47] of the track, north of the pot signal, there is a signal on a pole which governs the moves of what is known as the south hump, and moves to the crossover at this point. This signal gives very insufficient clearance if a man is riding on the side of the car.

After crossing a foot passage there north of this signal, we proceed down to what is known as a bridge signal, which governs the movements on Tracks 18, 17, 16 and 15. This bridge signal which governs the signals that are located on there for these tracks has insufficient clearance for a man riding the top of a car without being in a stooping position.

Then we come to a crossing known as the B & O crossing. North of this B & O crossing there is another bridge signal, or bridge there where the signals have been taken off which govern these four main line tracks. This bridge has insufficient clearance for a man to ride the top of the train without being in a stooping position.

From where we get our train off of Track 25, the rear man would be about two and one-half miles from where we cut the train off. We run anywhere from five to ten up to sixty-five cars on this delivery run.

The Pennsylvania transfer is a Yard that we make deliveries to out of the C. D. Yards, which start off of Track No. 24, our outbound or eastbound Yard there. We work this track up on Track 24, couple the cars, the air men couple the hose, the hose is coupled and the air is pumped up.

We get around to the B & O crossing and receive a signal there from the Pennsylvania operator as to what track we [fol. 48] will use, and after he tells us where we are going to pull into the Pennsylvania Yards, he lines the derail off of this running track called a Wye. The operator lines a switch which throws a derail. We proceed up this track

across St. Clair Avenue, which is under construction. We cross Exchange Avenue, which is being used at the present time to detour our traffic into the stockyards and over Highway No. 66 which leads up by way of Granite City. We have a flagman there to protect the movements over this crossing.

We cross off of this auxiliary track onto a lead track which leads over up to an inspection point at the northwest end of the Pennsylvania Yards.

Proceeding up from this pit, we get instructions from the inspector at the pit as to what track we will pull into, if we haven't received a track from the operator at the B & O crossing.

We move over this pit at a very low rate of speed. I would say four miles per hour.

Usually we get a track back out of this Yard which consists of quite a number of cars. We return out of the inbound Pennsylvania Yard down to what we call the east runner, to the point to where there is a signal located about 3,000 feet from what is known as Illinois Terminal High Line crossing, which governs the movement of trains operating in the Madison Yards over Merchants Bridge.

Coming down this auxiliary track, back with our train, there is some very close clearances there, some three limbs hanging over which hits the sides of the cars, and the fences are of very insufficient clearance along there for a man to be hanging on the side of a car. He is in danger of being knocked off.

[fol. 49] We come back down to Bowman Avenue. The crossing is protected there by a hand signal. Back over to Exchange Avenue, where the crossing is protected by a hand signal. We cross over what is known as St. Clair Avenue, which is under construction there. The embankment on this main line, I noticed on my last trip out there a few days ago, was piled up pretty close to the sides or stir rups of the car there as we returned through there.

From where we get our train I would say this delivery is approximately four miles long. We make two round trips out there and back in eight hours.

On the Southern Railroad transfers from the C. D. Yard, we go against Track 29 at the eastbound Yard, and work it up, couple them up, have the air coupled up on them,

and the air pumped up. We then proceed under instructions of the Yard Master as to the way we move out of the Yard on Tracks 17 or 18.

There is a pot signal located on the ground just north of the B & O crossing. We have a clearance on this, a signal to proceed. South of this signal is a bridge signal, which signals have been discontinued on this bridge. It is of insufficient clearance for a man to ride on top of the train with safety.

Across the B & O crossing there is another bridge with signals on it which is insufficient clearance for a man to ride on top of his train with safety.

We proceed up this track, and there is a small signal on the ground known as a pot signal, on Track 18. If this signal is clear we proceed up to another signal which is [fol. 50] on a pole on the right-hand side of the track, which is insufficient clearance for a man to ride on the side of the train with safety.

After crossing Missouri Avenue a short distance, there is a bridge signal there with signals on it which govern the movements of tracks off of the hill, and known as Tracks 1 and 2. It is very close clearance on the left-hand side of the train on this outward movement, and very dangerous for a man to ride that side of the train.

Then we cross what is known as the Detour of Broadway. It is very heavily traveled.

We approach an incline there. When we get to the top of this incline, or practically to the top of it, there is a track leading out of the L & N Yards to their House Yards. In making a stop, if properly made for this crossing, with the short amount of cars, if we break off of the train it would be impossible for a man to protect the life of the people on the crossing, which is a detour of Broadway and is very heavily traveled.

Then we head across this subway. Practically on the edge of the subway there is a switch which leads off. This track is known as northbound I. C., the Illinois Central main line onto what is known as the Southern main line.

Heading in on this main line track, the Southern has a freight house there, the track that lies next to their main line track. There is a very short curve there, and it makes it impossible to see around that curve with over eight or ten cars.

We cross over 4th Street, and cross another street known as 6th Street. This street crossing has no watchman after 11:00 o'clock P. M., to protect the crossing.

[fol. 51] Then we proceed around a right curve there for about a hundred yards, and then turn left on this track to a left curve which we call a reverse curve up to a street crossing, which is known as 8th Street. This crossing has no bells or lights or anything to protect it except the crossboards. There have been instructions put out to switchmen or men in charge of the deliveries to protect themselves against this crossing.

After we leave this crossing, we come to another crossing known as 10th Street. This crossing is not protected after 11:00 o'clock P. M., by a switchman or a gateman.

We proceed to 15th Street, which is a very heavily traveled crossing, practically all of the colored people living over in South East St. Louis, who travel at all times of the night across that crossing. That crossing isn't protected after 11:00 o'clock by a gateman.

We get our train back off of Track No. 4 at the Southern Yard. We couple our train up, the air man couples the hose up, the air pumps up, and we pull out on the lead.

There is a third rail there, what you call a third rail, and there is a pot signal located on the right-hand side of the track which is covered by this interlocking plant at this crossing, and which is used by the Terminal, known as the Cotton Belt.

We proceed across this crossing and come to a switch that heads us out onto the main line, the outbound main line of the Southern.

We head out on this main line track after lining our switch back to the proper position, and proceed on our return trip to this first road crossing. I believe that street [fol. 52] is called Church Street. They have no flagman or switchman protecting that street.

We proceed in a western movement until we come down to 15th Street, or 16th Street, where we have a gateman until 11:00 o'clock P. M.

Heading out on a single main line track, we have no instructions to run in this direction any more than knowing we are leaving the Yard at Copeman Junction and down to 8th Street. We stop at that crossing there. It isn't protected by a flagman or gate or any signals with the exception of a crossboard.

We proceed forward until we come to 6th Street, which puts our engine on a left curve. The crossing is protected between 11:00 o'clock A. M. until 11:00 o'clock P. M. by a gate watchman.

We proceed to 4th Street which crossing is protected by a gate watchman up until 11:00 o'clock P. M. Then we start up the incline, which is a very steep grade.

We go to the telephone box and get permission from the tower to pull on out on the northbound main line. We proceed then up to the L & N crossing. But in pulling up this incline, there is a very short curve there, and a very steep incline. If a car would break off it would be impossible to stop it before it rolled clear back over 4th Street and 6th Street, if it was a load. That would probably endanger the lives of the public.

After pulling off of the north main line, we go down a very declining grade there to this detour on Broadway. After getting a pot signal just north of Broadway Detour, [fol. 53] we usually are routed back for the track known as No. 18.

After we get this pot signal, we come back by this bridge signal there which governs these movements off the hill, and which is of very insufficient clearance for a man riding on the side of the car.

We cross Missouri Avenue at passing this bridge. After that, there is a signal located on the pole on the left-hand side of the train as we are routed down No. 18, which is an insufficient clearance for a man riding the side of the train with safety.

We proceed down this track, and come to another bridge which is located south on the Baltimore & Ohio crossing with signals on it. There is insufficient clearance for a man to ride the top of his train.

After crossing the Baltimore & Ohio tracks we come to another bridge where the signals have been taken off, which is insufficient clearance for a man to ride the top of his train with safety.

This particular run or delivery is about four miles each way and we usually make two round trips a day in eight hours. We use from fifteen to fifty cars on this run.

A signal is either a light, a disc is placed on a pole to conform the movements on the track. A bridge is a construction that is placed across the track. I would say around

anywhere from fifteen to twenty feet high, and there are signals placed up on this bridge, which govern the movements of traffic on the line the signal is placed over.

We have signals located on the poles known as wayside [fol. 54] signals, which stand on a round pole. At the end of the pole they have a disc which governs—and a paddle or board or arm which governs the movement of traffic, usually located on either side of the track.

Being assigned to this L & N delivery by the Yardmaster, at Cabin 1, the capacity track is what is known as Track No. 26, our receiving Yard. We go down and couple this track up Track 26. After we couple up the cars together, the air man couples a hose on the cut of cars, and we go to notify the Yard Master we are ready to go over this L & N delivery.

We get instructions from the L & N operator located just east of the B. & O. main line crossing. If he gives us a clearance, we throw a switch there that leads on to what is known as Track No. 25, off of the L. & N. main line. We proceed a short distance further, and throw another switch. This switch leads through this crossover up to the B. & O. crossing.

(Here it was stipulated and agreed by and between the respective counsel that if this witness were to testify to the L. & N. deliveries, B. & O., Wiggins-Columbia deliveries, Chicago & Alton deliveries, Big Four deliveries, Wabash deliveries, Nickel Plate deliveries, Litchfield & Madison Railroad Company deliveries and the C. D. Yards Madison deliveries, that his testimony would be substantially the same as heretofore testified to on these other runs.)

This run is approximately three-quarters of a mile, and takes anywhere from thirty minutes to an hour under ordinary circumstances. I have taken as low as one car over there and have taken as many as seventy-five cars.

[fol. 55] The letters "C. D." mean Central District.

The distance from the M. & O. delivery transfer is approximately four miles each way, and the trip requires from one to three hours under ordinary circumstances. We use anywhere from one to sixty-five cars on these runs. Ordinarily, that delivery is made twice each shift.

The Wiggins-Columbia delivery is approximately a mile and a half, and takes anywhere from forty minutes to two

hours. We make one to two trips each eight-hour shift, and use from one to seventy-five cars.

The Chicago & Alton delivery I would say is approximately three miles each way, and I have made as high as six trips in eight hours, taking from one to two hours for each trip.

The Big Four deliveries are approximately one mile and take from thirty minutes to an hour or an hour and a half. I believe I make one trip in eight hours on dead freight, and maybe a dozen trips with hot cars, perishable stuff. It is pretty hard to judge the amount of trips you make with that delivery. Anywhere from one to seventy-five cars are used in that delivery.

The Wabash delivery is approximately a mile and half, taking anywhere from thirty minutes to an hour and a half. In the twenty-four hour period, we make as high as fifteen or twenty trips in twenty-four hours, and use from one car to one hundred cars on that delivery.

The Nickel Plate delivery is approximately a half mile and takes thirty minutes, in ordinary circumsfances. We make one trip in eight hours and use from twenty-five or thirty cars.

[fol. 56] The Litchfield & Madison Railroad Company delivery is approximately a half a mile and takes around twenty to thirty minutes. We make two or three trips in twenty-four hours and use from twelve to eighteen cars.

The Madison delivery is approximately three miles and two round trips are made in eight hours. They take anywhere from one to twenty-five cars.

The stockyard delivery is approximately a mile and a half and takes about forty minutes to an hour and a half. We make about five or six trips in twenty-four hours and use anywhere from one to forty cars.

The clearance and other hazards could be eliminated on these runs by a caboose, which would eliminate the hazards in regard to close clearance of signals and bridges, bridge signals, and would afford us better protection in observing the train and getting off and throwing switches and lining switches back. It prevents you from being knocked off of the top of the cars on account of not sufficient clearances from overhead grade signals. It would protect you from being knocked off of the top of a car when making sudden stops or sudden starts. Where an engine would be forced

to make a stop with the emergeney brake, it might result in you being knocked down on top of the car or being knocked off of the car.

It would afford you the protection in regard to your train breaking off on stiff inclines, for you would have a properly equipped caboose that would give you protection of air brakes on that caboose, which you have no assurance of [fol. 57] under the conditions which we are operating under at the present time.

It would afford you the protection of being more able to do your work on account of inclement weather such as sleet, snow and ice which sometimes are on the grab irons of the cars, or tops of the cars, when you have to get down to throw switches. It would also protect you in regard to having a place to ride on your train instead of having to ride the drawbar of your car, down on a sill where the drawbar is fastened onto the car, which is a very dangerous position for a man to ride in under any conditions of weather.

It would give you the protection of having a place to carry your flagging equipment, being red lanterns, and in not being able to light them in the rain and snow. You would have a caboose and a place clean and dry to have them lighted, ready to hang out when dark comes.

It would allow you to prevent anyone from running into the hind end of the train when you had to stop on main lines or curves where you would not be observed from long distances. It would also give you the protection of being able to carry your lunches and raincoat and first aid equipment in case you had a finger cut or something on the drawbar. You would be able to take care of yourself if you had proper equipment in the caboose for first aid, and avoid blood poisoning setting up before you could get medical attention, resulting sometimes in the loss of a hand or life. I think a caboose would be very efficient protection.

In carrying equipment without the use of a caboose—my [fol. 58] job is hind man on this delivery job—I have to carry my red light after it gets dark, and hang it on a grab iron on the rear end of a car. In climbing off for switches I have knocked the light off, or caught the corner of my overalls on the corner of the light.

On the rear end of the car you have to carry a white light in your hand, and sometimes are not on the end of the car where you have a brake staff to hold on to, and have to hold on the best way you can. Maybe there is a board there that

has been on cars where they have tacked "inflammable" signs. You hold that with one hand and stand on the drawbar, and have your lamp in the other hand. You have to swing around the point of the bar to get up, and have the red light hanging there. If your shoe sole is wet and you step on the bar, it slips. It is a hazardous way to carry the light, but the only way you have.

Your lunches—if you expect to eat when you get hungry, you stick a couple sandwiches in your pocket. Otherwise you put them on the pilot of the engine where they are exposed to rain and wet. If it rains and it is in a paper, you do not have any lunch. You get dirt and stuff in your lunch that you have sitting up on the tank of the engine.

We haven't any first aid equipment on our engines. The only first aid equipment we have is back in our yards in the shanties. In the box in Cabin No. 1 we have first aid equipment, but on the engines we have none.

In operating Pennsylvania main line trains, under the rules a man is required to carry a yellow flag by day, and [fol. 59] also a red flag. On other roads we do not carry any flags and equipment. The Pennsylvania furnishes this flag equipment for daylight flagging.

We carry a red lantern and a white one as flagging equipment by night.

A clearance that isn't sufficient, like an overhead bridge, for a man to stand straight, or where he might be caught off his guard and be standing on some box car which is higher than the others, or a higher box car, if it would be after night, and not thinking the bridge was located there with these signals on it, and being on the hind end of the train he would be standing and trying to observe the movement of the train, and that signal would knock his head off if he did not duck down to keep from getting hit.

Or a close clearance on a bridge where signals are located like the one on Track No. 1 off the hill there at Missouri Avenue, that signal you can't stick your head around the side of the car or out of the cab or window because the signal is too close to the cab, and if you stuck your head out it would knock your head off. It makes it impossible for you to look around the side of the train when passing that signal.

If signals are close, like the one on Track 18, coming off of the Illinois Central northbound main line, or a pole sig-

nal, a fellow spotting up the coal chute, if not very careful, will be swiped off the side of the car by that pole signal there. There is not sufficient clearance for a man trying to ride on the side of the car without pulling himself in to keep from being hit.

A properly equipped caboose would have markers, tail [fol. 60] hose, first aid kit in the caboose, and living facilities. That is my understanding of a properly equipped caboose. Also a conductor's valve and an air gauge.

If the caboose was properly equipped with lights a passenger train to the rear of you could see the lights. They have a light on each side, a marker on each side of your caboose. If a fellow was coming around the opposite curve, like out of the Southern Yards there, off the Southern main line, that is a short curve. If you had a properly equipped caboose, the marker on the right-hand side coming in off of the main line could be observed by the engineer that was following you up, or the crew that was following you up, where with the red light you have to put it in the position where you would be able to get it.

All of these delivery runs are within the State of Illinois: We are not equipped with a caboose on the Pennsylvania transfer deliveries, the Illinois Central deliveries, the L. & N. Deliveries, the Wiggins, the Chicago & Alton, Big Four delivery, Nickel Plate delivery, Wabash delivery, Litchfield & Madison delivery, Madison delivery, nor Stock Yards transfer delivery.

Mr. Campbell: That is objected to, and move to exclude it upon the ground it is not a question of comparison, that similar conditions are not shown and it is not shown to be the same run.

Mr. Daley: Sustained.

The Witness: The other runs on these other roads are substantially the same as the runs I have testified to, and the conditions are the same.

[fol. 61] Mr. Campbell: That is objected to.

The Witness: They are identical.

Mr. Schwarzbach: I think I have laid the foundation for it.

Mr. Daley: No, I do not believe so, I do not believe you can run that in as a comparison.

Mr. Schwarzbach: I think we have gone into that situation at the last hearing.

Mr. Daley: There was a comparison and parallel drawn for some conditions, but I do not believe the comparison is proper here.

Mr. Schwarzbach: Of course, I can't agree with the Examiner on that question, where the conditions are substantially the same and they run over the same tracks. I think we should be able to show the examiner some law on that point. I would like to have the Examiner reserve this ruling on that point until I can submit some law.

Mr. Daley: All right. It is my belief that this case should stand on its own merit, and I do not believe a comparison would provide any basis for merit in this case. However, I will reserve the ruling, if you feel you can provide something along that line.

Mr. Abrams: This witness has worked for fifteen years in the East St. Louis District. He has delivered transfers to these various railroads, and of his own personal knowledge knows and has seen the other railroads make the deliveries to the yards, and has worked in there with them for fifteen years.

Mr. Daley: All right.

Mr. Campbell: We want to object to it, if the Commissioner please.

[fol. 62] Mr. Daley: I think your objection is sufficiently clear in the record.

Mr. Schwarzbach: I understand the ruling is reserved.

Mr. Daley: Yes, sir. Let the record show the ruling is reserved, and the answer may stand.

Mr. Schwarzbach: What other railroads operating over the same track you testified to furnishes cabooses?

Mr. Campbell: Will our objection stand to all of this line of testimony?

Mr. Daley: Let that be understood.

The Witness: The Illinois Central Railroad furnishes cabooses for their employees operating over the same piece of track we operate over in making deliveries to them. They come back over this same piece of track, making deliveries to us, and they have a caboose.

The Southern Railroad has a caboose at times on their deliveries on the same track we operate over.

The Nickel Plate furnishes a caboose on the tracks we operate over. We operate over the Pennsylvania Railroad from Rose Lake Yard to the Baltimore & Ohio crossing.

The Pennsylvania operates over this same piece of track and they furnish their employees a caboose. The Alton Railroad and the Baltimore & Ohio from Venice over the track we operate over, they furnish their employees with cabooses. The Rock Island furnishes their employees with cabooses over a piece of track we operate over from Madison to East St. Louis. The C. & E. I. operate over the same piece of track and they have a caboose. The C. B. [fol. 63] & Q. Railroad do not have a caboose. They come in and get our loads off of Track 8 in the Old Yards. They do not have a caboose in there.

Cross-examination.

By Mr. Campbell:

The I. C. has a caboose from Sixth Street up into our westbound Yard, over their northbound main line and return over the southbound line. That is the same run from the C. D. to the I. C. connection; over the same piece of track we go over and between the same points; starting at the same place and ending at the same place.

A pot switch is a signal, a fixed signal located at a designated location, which is termed in some cases the home signal.

At the present time there is a lot of temporary work between Relay Stations and the Illinois Central at Trendley Avenue by reason of the new subway under Broadway. I cannot say whether or not it is completed, I could not tell by looking at it. I understand the Commissioner of East St. Louis is going to close it until the Terminal have lights there. That is what I read in the paper. So far as the railroad is concerned, I would only be able to state from personal knowledge in regard to work that has been done by the Terminal there. We have a bridge approach standing there three years very nearly completed, and it isn't complete. The subway might terminate like the bridge before it is completed. I am over there practically every day and live at East St. Louis.

According to my personal knowledge in regard to the hazardous conditions of signals I have testified to, they have [fol. 64] been there since my employment with the Terminal, and I am sure I am in no position to know whether they will be removed or will not be removed. The signals

and switches were there before the work started on the subway. The pot switches cause the hazardous condition of operation. All but one pot switch was there before the subway started. That is the one that governs the movement over the detour of Broadway on the in and outbound main line, both ways. The switch on either side of the pot signal, or each side of the crossing, was put there since the construction work was started. But the other signals have been there. They have replaced some bridge signals there with pot signals in the last three or four years.

According to my knowledge the grade crossing just south of the relay to go to St. Louis on a temporary detour will always be there, for they cannot cut the subway down to meet the track level. I am talking about the subway that affords a grade over the highway.

As far as I know the grade crossing, the grade highway crossing is a temporary detour while that subway is being completed.

It is approximately a distance of four miles each way where we make our deliveries on Track 28 in the eastbound Yard. I do not know whether or not it is a distance of just two and one-quarter miles from the switch of the C. D. Yard to the switch to the M. & O. delivery.

I count my distance from the C. D. to the Southern Yards where my train is made up and where I climb on the hind end of it, which is on the north end of the eastbound Yard on Track 29.

I do not know how far it is between the first switch en- [fol. 65] tering the I. C. Yard to the last switch leaving the C. D. Yard. I do know approximately how far I am assigned in that delivery and the duty I am under in making the delivery.

It is not a fact that from the last switch where I leave the C. D. Yard to the first switch entering the L. & N. Yard is about a quarter of a mile. It is not a quarter of a mile from the extreme limits of one yard to the nearest limits of the other. There is a milepost at the operator's shanty, after we cross the milepost just opposite Bridge Junction, where we go to the Big Four. It is about one mile. It is exactly one mile from the last switch of the C. D. to the first switch at the point of delivery of the first switch of the Big Four Yard.

I figure the distance where my duty is assigned, and until relieved from my duty at my destination.

I would ride approximately one mile in making the delivery to the Big Four from the C. D. Yards. It would be a mile from the time I got into the caboose to where I got out to do my office work in that Yard. If you were shoving the cars, it would be, and you never shove them. If we are pulling cars, the distance you would ride in the caboose —I would not be able absolutely to determine the distance, for lots of times you pull on the tracks, and the tracks hold fifty cars, and you would pull up the full length.

We pull the trains on the M. & O. deliveries. The Southern, the I. C. and the Pennsylvania. We do not pull the L. & N. trains at all times. We shove to the L. & N., too. We pull and shove on The Big Four and the Wabash. We pull on the Alton. We shove most of the time on the L. & N. [fol. 66] We pull and shove on the National Stock Yards. We deliver to Columbia No. 5 by pulling.

We have lead engines that do switching.

I have stated before that these hazards would be eliminated if the cabooses were there, regardless of who went by there.

If a crew went by there, what we term a lead crew assigned to lead work, with a number of cars he would have the same hazardous conditions we would have or anyone would have. Regardless of who went by they would have the same condition.

We have to do intermediate switching for the plants between on these movements from C. D. Yard to any other place. We switch the Elliott Frog Works there. We switch the icehouse on the Illinois Central at 6th Street sometimes. Sometimes leaving C. D. for the Illinois Central, going to the Illinois Central, we have cars in our train for Elliott Frog Works.

I do not know of any other plants switched down on the Illinois Central run except the Elliott Frog Company and the icehouse. The only switching done in making that M. & O. delivery, sometimes the Yard Master will assign us to double delivery. We take the Wiggins and the M. & O. together and switch the Wiggins out at M. & O. Junction coming back and get them and take them down.

There is some intermediate switching done between the points of leaving the C. D. Yard and delivering to the Southern on the Southern Railroad coming out of the Southern, we go to the brewery and pick up a car of beer.

My understanding is it is Southern tracks from where you hit out of Illinois Central northbound main.

[fol. 67] On the Pennsylvania deliveries, we sometimes have cars stop for the Hunter Company that we set out at Willows.

We have no switching to do on the L. & N. deliveries, the Big Four, The Wabash, The Alton nor the B. & O.

To my knowledge I never knew of a schedule to be put on a switch engine between the C. D. Yards to Copeman Yards on the Southern Railroad, with a train each way fifteen minutes, with a light engine twelve minutes, and round trip with train not to exceed fifteen minutes. There is no schedule on the Terminal in regard to switch engines. There is a notice posted on the board in regard to running time on these deliveries.

With reference to the Pennsylvania Inspection Pit and the C. D. Yard running time, when we want to operate on the Pennsylvania Railroad, the Pennsylvania Examiner on the book of rules told us there was no schedule to be placed on switch engines. No schedule on the Terminal in my fifteen years of service in regard to running time of switch engines.

There has been a notice posted on the board with regard to running time on these deliveries, but I would not say a general notice or general order. I did not pay that much attention to it, for it did not interest me.

I would not say whether I ever signed it or not. If I did not I guess I would have a letter.

I never paid any attention to any notice providing that the scheduled running time between the C. D. and the M. & O. round trip with train sixty minutes, each way [fol. 68] with train twenty minutes, light engine fifteen minutes and therefore do not know about that. I do not know about the running time of switch engines. I do not know whether I receipted for any schedule. It might have been a matter of form if I did. A matter of signing a No. 180 Form card there.

Mr. Henry Miller is the Assistant Superintendent for our territory.

I said I had not paid attention in regard to running time. What you call a general order being placed on the board putting schedules on a switch engine. We operate the moves on safety. I never saw any general order put out to that effect, in regard to running time.

Redirect examination.

By Mr. Schwarzbach:

In designating these distances, I meant the place I am assigned to duty on the train to where I am relieved from duty, handling that train or cut of cars.

Further redirect examination.

By Mr. Abrams:

We have some jobs there that the main line engine is a lead engine. There are four men assigned to that job. The operation of that move is to go in, get a cut of cars, drag them out on the lead, and classify them on the designated tracks that are assigned to the different trunk lines we deliver to or have connection with out of the Yard. In placing these men on the job, the pin-puller, the head man on the job, the first man—the fore man and then the pin-puller. He drops off and gets these cars—the switch tenders there, down the lead, getting the switch and putting them on the track they are classified for. They operate [fol. 69] on that lead, and throw the cross-overs, and the Yard,—the Yard consists of eight tracks. The eastbound Yard, we have about twelve classification tracks, and we switch cars into them in that part of the Yard. Sometimes these switch tenders or switchmen, lineup men sometimes they are termed, lineup men on some roads—they go off this lead over to the crossover to get the leads over there, and then we have a track called the icehouse lead coming by the lead. They kick cars down that lead, and the two field men get switches back and forth across the two leads. The pin-puller—The field men are placed down the lead in the position wherever their classification of cars are to go in the cut. They are all on the ground.

I never saw any wayside signals adjacent to a lead with lateral tracks running off of it in that Yard.

They have no bridge signals in that Yard, because it is a classification Yard. We have no use for them there. The signals are transmitted by the crew, hand signals or line signals. That is the only signal we pay any attention to in the making and breaking up of trains in the Yard.

A lead track is a track commonly known as the lead in which lateral tracks are switched off of in making up and breaking up or switching cars in the Yard.

Recross-examination.

By Mr. Gampbell:

In working in the Yard without making deliveries, the switch crew, in making up trains and breaking them up, does not get out of the C. D. Yards down around Relay [fol. 70] Depot, but the engine goes that far. In switching, the engine and the head end of the train get that far. The cars pull up 17, but the work is all done this side of any pot signals or anything but switches.

Mr. Ralph S. Chill, called as a witnes on behalf of the complainant, being first duly sworn, was examined and testified as follows:

My name is Ralph S. Chill, and I live at 5020 Tholozon Avenue, St. Louis Missouri. I am a switchman employed by The Terminal Railroad Association of St. Louis. I have been employed there for eighteen years. I am now employed on what is known as the high line, transfer and miscellaneous, all within what is known as Yard No. 2.

I am familiar from my own experience and observation with the runs out of No. 2 Yard known as the Dupo Transfer, Cotton Belt Transfer, Madison Transfer, Illinois Central Transfer, Stock Yards and C. D. Delivery, Southern delivery, Baltimore & Ohio and Alton deliveries, Big Four Deliveries, Moberly & Ohio deliveries, Louisville & Nashville deliveries, Chicago, Burlington & Quincy deliveries, Wabash and Nickel Plate deliveries, Phillips Petroleum delivery, Darling and Company, Midwest rubber, Monsanto Chemical Company, Falling Springs and Cahokia Power Plant. All from the Wiggins Yard No. 2.

(It was stipulated and agreed that were this witness to testify to the various runs and deliveries hereinabove mentioned, his testimony on direct examination and his testimony on cross-examination would be substantially the same as the testimony given by the preceding witness, Mr. William Satterfield, wherein that testimony would be applicable.)

[fol. 71] Mr. Campbell: Yes, of course, it is understood we are just stipulating he would testify to that.

Mr. Schwarzbach: That is correct. You are not admitting it.

Mr. Campbell: Now, I want this clear. Those apply from Wiggins Ferry Yard No. 2 or from C. D. Yard.

The Witness: Wiggins Ferry Yard No. 2.

On this Dupo transfer we are supplied with a caboose there approximately from October 15 to May 1 of each year.

On the high line transfer, we are supplied with a caboose for the same period of time.

On the Falling Springs, we are supplied with a caboose the year around.

With reference to the other transfer talked about, we are not supplied with a caboose at any time.

All of these transfers are confined within the State of Illinois.

Fritz Roush, witness on behalf of the complainant, being first duly sworn, was examined and testified as follows:

My name is Fritz Roush and I reside at 1618 Second Street, Madison, Illinois. I am a switchman employed by the Terminal Railroad Association of St. Louis. I have been employed there for eighteen years. At present I am employed on the Dupo run, out of Madison Yards, and the Granite City run out of Madison Yards.

(It was stipulated and agreed that the testimony on direct examination of this witness and also the examination on [fol. 72] cross-examination would be substantially the same as the testimony of Cheatham, who has heretofore testified.)

Mr. Campbell: That is all right.

These two runs are confined within the State of Illinois.

We have the use of a caboose on the Dupo run the year around. We have no caboose on the Granite City run.

John T. Cox, witness on behalf of the complainant, being first duly sworn, was examined and testified as follows:

My name is John T. Cox and I reside at 1702A Chanteau Avenue, St. Louis, Missouri. I am a switchman employed by the Terminal Railroad Association of St. Louis since December 23, 1925. At present I am employed on the run known as the Freight and Passenger.

On the freight run, coming off of the bridge, we usually travel on Track 71, with very close lateral and horizontal

clearances. It is necessary for the rear man to ride the drawbar on the rear end of the rear car, with no clearances on the side or top, on a heavy downgrade incline off of the bridge to Missouri Avenue.

We usually come down on Track 17 past C. D. and the eastbound Yard on any designated track, and deliver the train. If we have stock, which is usually held ahead, we proceed from the eastbound Yard over to the stockyards, out of the eastbound Yards on the main line, and go about 400 feet to a switch that enters the stockyards on a running track. We go up the running track to the upper end of the stockyards, through another crossover on Track No. 1, and [fol. 73] shove back to a landing for unloading. If we have cattle or horses, when those cattle or horses are unloaded we shove under a pass that will not clear a man standing on a car around to Exchange Avenue, where we unload sheep, if we have sheep.

Those sheep are unloaded, and we shove over Exchange Avenue under four over-passes across the St. Louis Junction Railroad tracks, across St. Clair Avenue, under the Terminal main line through a double crossover back onto the north hump lead, and deliver our stock cards at the north hump on the designated track.

We cut the engine off, and go through some tracks into the south end of the Yard, where we make up a train off of various tracks designated by the Yard Master. With this train, when made up, we leave the south hump on what is called the south hump lead, out across the plant onto the bridge approach.

Sometimes when we have a short train of thirty-five or thirty-six cars, we get a pusher at the south end of the south hump as we are leaving. If we have a longer train and double one or two tracks to get the rear end of the train we use that engine as a pusher. Where we have short trains, the pusher engine stands in the clear at the south end of the hump, or on a passing track east or west of the hump, and as the rear end passes this engine takes out after us. We have to couple this engine on while in motion.

We go up on the bridge approach, and have to cut this pusher engine off on the bridge.

This is all within the State of Illinois.

[fol. 74] A caboose would eliminate nearly all of the hazards mentioned. If you had a caboose, it would not be

necessary to hang onto a drawbar coming off of the bridge. We would not have to stand on a drawbar and couple a moving engine onto a moving train. We would be standing on the platform of the caboose. We would be where close clearances would not bother us, either in the caboose or on the platform of the caboose.

A close clearance is an object alongside or overhead the cars that will not clear a man on the side or top of the cars.

A drawbar is a metal coupler that is used for coupling two cars together. Each car has two drawbars. They are supposed to be automatic, and when the cars come together, when the knuckles are open or the drawbars open, they will couple and hold the cars together.

By use of the conductor's valve in the caboose you can stop a train as quick as the engineer can stop it with the engine.

When a train is too heavy for one train to pull up the approach of the bridge, they put one and sometimes two engines on the rear end of the train to help the lead engine. They are pushers.

We do not have the use of a caboose on this run at any time.

We cover approximately one mile on the Illinois side on this run.

Switching is practically the same every place I have worked.

A switchman can perform his duties from a caboose better than on top of a box car, and much better than you could from the drawbar.

[fol. 75] Cross-examination.

By Mr. Campbell:

My run starts in the State of Missouri and crosses Eads Bridge, and brings cars you get in Missouri, delivering them in Illinois, and we take cars back from Illinois to Missouri. The run I was testifying on is a run from St. Louis, Missouri to points in East St. Louis, Illinois, over Eads Bridge across the Mississippi River. When we bring a cut of cars from St. Louis, Missouri, that enters Illinois at the boundary line at Eads Bridge.

Objection by Mr. Schwarzbach to all of the testimony.

Mr. Campbell: Now, we have to exclude all testimony of Mr. Cox on the grounds set forth in the other hearing, that this Commission has no jurisdiction over a run starting in Missouri and going to Illinois, or starting in Illinois and going to Missouri.

Mr. Schwarzbach: In other words, the arguments you gave apply now as well as they did at that time.

Mr. Daley: Yes. That motion will be taken with the case.

George H. Cox, witness on behalf of the complainant, being first duly sworn, testified as follows:

My name is George H. Cox. I reside at 1817-42nd Street, East St. Louis, Illinois. I am a switchman employed by the New York, Chicago & St. Louis Railroad Company. This railroad operates over the tracks of the Terminal Railroad Association in the East St. Louis District in the State of Illinois.

[fol. 76] We have the use of a caboose. It is equipped with platform and steps at each end, and cupola above, and has train line control by means of pipe valves in each end. In addition, a signal whistle to be used in case of backward movement. In side, in the cupola, are built-in marker boxes containing the required markers for protection of the rear end. Red lamps are also furnished, two red lamps for each caboose, for flagging and rear end protection. There are benches built on each side, three of them. Four seats are provided, two facing each way in the cupola, for which cushions are furnished for comfort. The flagging equipment provided on the caboose includes eighteen red fuses, and six yellow fuses, two red flags, and the beforementioned two red lanterns, and in addition one white flag. That is standard flagging equipment on a caboose. We are also provided with extra air hose and dummy air hose, two or three ARA knuckles, and three additional knuckle pins.

For the convenience of the crew using them, there are built-in lockers for storing their rain clothes or other garments. There is a built-in icebox and water can in which to carry drinking water. There is also a stove for winter use.

The equipment includes such things as sink built in with a water reservoir above it, and a faucet over the sink so

that we may have a place to wash and clean up. Soap is provided for that, one bar of soap provided to each caboose.

We have in addition such tools as might be needed at any time in our work in the way of a hammer, a hatchet, a [fol. 77] sledge, a pinch bar, a chisel, and an eighteen-inch pipe wrench bar, a twelve-inch monkey wrench.

We also carry packing dope and cooling compound to be used in the event it is needed in hot journeys. We are also provided with an emergency knuckle. First aid kits are provided for all cabooses.

A dummy air hose is a short piece of hose about 12 inches or 15 inches long with standard iron connections in each end, in case, as once in awhile happens, the air hose of the two cars will not meet to connect. This dummy is used in there for the additional space required.

A marker lamp is required in the standard book of rules designating the rear end of trains, especially when operating on main lines. The marker lamp on the Nickel Plate cabooses,—Nickel Plate meaning the same as the New York, Chicago & St. Louis—is placed, built in the side of the cupola, and lights on the top. It is the box in which the lamp sets, in a holder, and slides, having colored wings of the required red, green and yellow colors as provided to slide in on either side of this lamp—that is, to the front and back—to give us the required color display for rear end indications. The one on the top of the cupola known as the deck light is similarly supplied with color discs.

We carry all equipment for washing facilities. Towels incidentally are not provided. Other things are. We furnish our own towels.

We have two lockers that are used or may be used by the crew, and an additional locker that they may use, but which is usually used for storing these various supplies.

[fol. 78] The three bunks on either side are provided with full length leather cushions, about three inches thick. In addition, the four seats in the cupola, two facing each way, are provided with cushions of the size of the seats, and the windows are provided on all sides of the cupola for vision.

I have been employed by the Nickel Plate road for sixteen years.

I might add in the standard equipment built into the caboose is also a very good desk, containing our stationery supplies, and wall lamps are provided at three different

places on the walls of the caboose. We carry our rain clothes in the caboose.

The caboose is provided all year round.

Mr. Campbell: If the Commission please, I have not objected before, because I wanted to see whether they were going to bring out any evidence of any comparable conditions in the switching Yards of the Terminal. We therefore move to exclude the testimony of this witness upon the ground there is nothing in his testimony to show any comparable conditions with those existing in the Terminal Yards.

Mr. Schwarzbach: I don't know how it can be any more comparable when they operate over identically the same tracks in this district. I don't know how it can be any more comparable than that.

Mr. Daley: Well, the motion will be taken under advisement.

[fol. 79] Cross-examination.

By Mr. Campbell:

The Nickel Plate is a trunk line. It runs from St. Louis to Buffalo, on another line, from Chicago to Buffalo, the St. Louis line joining that or near Bellevue, Ohio. It has extensive switching Yards in St. Clair and Madison Counties, Illinois. It has an extensive Yard adjacent to Madison, Illinois, and connecting Yard at East St. Louis near the river front, in the neighborhood of the Illinois Central Depot at Madison, where the new overhead highway crossing over the State Route has recently been erected.

Our Yard is east of the viaduct and east of the State Highway. I would say close to 2 miles east. There are about twenty-four tracks in the Yard, and at the point of the greatest width of Yard is about three-quarters of a mile east of the State Highway. We use these Yards for making up trains and breaking them up. I am a member of one of the switching crews that work in that Yard. I work from 3:55 o'clock P. M. up to 11:55 P. M. We have three members of the crew on the ground and the engine crew in the cab, which would include the foreman, two switchmen, the engineer and fireman.

My duties vary from day to day to some extent.

The crew usually takes their caboose and then go to the Madison Yard, westbound Yards, as we call it, and get the deliveries of East St. Louis Junction Railroad, the stock yards as we call it, and then we proceed to East St. Louis Junction with those deliveries. It is about 3 miles and we take our caboose with us.

After completing this delivery to the East St. Louis Junc-[fol. 80] tion, we proceed to the Nickel Plate Freight House down near the river front to do the switching and get out the merchandise. It is about a mile and a half on the river front to the delivery point and we take our caboose.

After switching the merchandise from the house, we take it back to Madison, and incorporate it in our outbound train. That would be about 4½ miles, from the place we get it on the river front and take it back to the Madison Yards.

We usually switch a train in the westbound Yards, breaking it up, and taking the deliveries to East St. Louis connections, including the bridge, the Terminal Railroad, C. D. Yard, and Wiggins north for the deliveries and the rest of the stuff is sometimes taken to the Southern connection, the Alton, or the Baltimore & Ohio, and whatever connecting work we may have. We deliver them, and proceed on into our freight house Yards, reset the house switch, the transfer track, and so forth, and then pull the connections, the cars coming from various connections to the Nickel Plate, and take that stuff back to Madison, using the caboose all of that time. Then we go back to the Madison Yards.

It is about 4½ miles from the Madison Yard to Wiggins Yard No. 2. It is 4 miles from the Madison Yard to the C. D. Yards of the terminal. It is about 3½ miles from Madison Yards to the Southern connection. On the Alton and B. & O. runs it is about 5 miles.

The Witness: The crew I am with today does go to St. Louis occasionally, but not regularly. There are crews going over there, some two or three times a day.

[fol. 81] In making the run from the Madison Yards to the river front we do not touch on Terminal rails. We run on our own rails all the way. If we go to the C. D. Yard we are on Terminal rails all the time after leaving the Nickel Plate main line at Bridge Junction, which is almost a mile east of Relay Depot. Bridge Junction is slightly over 3 miles from our Madison Yards.

Redirect examination.

By Mr. Schwarzbach:

It is about 3 or 3½ miles from our Madison Yards to the Stock Yards and our switching is practically the same.

THOMAS STRIKE, witness on behalf of the complainant, being first duly sworn, testified as follows:

My name is Thomas Strike. I reside at 1415 North 53rd Street, East St. Louis, Illinois. I am a switchman employed by the Illinois Central for twenty-one years.

The I. C. operates over the tracks of the Terminal Railroad Association in the East St. Louis District in the State of Illinois.

We have the use of a caboose all year around. Our cabooses are steel underframes with a cupola. We have a water cooler and built-in ice box, a desk and chair. And then we have our flagging equipment, including fuses, red flags and torpedoes. We have a tail hose, and a conductor's valve. We have a water jug. The Company furnishes those. We have emergency knuckles, and a short chain, a link and hook. Then we have a stove and oil boxes. They furnish the oil boxes. There is a partition built in there to [fol. 82] carry the oil, and boxes to set them in. There are our markers. We have a Stilson wrench about 18 inches, I believe, and a monkey wrench about 12 inches—I believe that is what it is. And a shovel and a pick.

We have the use of a toilet in our cabooses.

The tail hose is used for our protection in going over road crossings, or if we happen to be going against an engine we can stop him with the tail hose. It has a whistle on it, for road crossing, to make a sound, so as to notify pedestrians or automobile drivers we are coming.

My testimony is substantially the same as that of Mr. Cox with reference to equipment and so forth.

Cross-examination.

By Mr. Campbell.

I go to various places. As a rule, in my regular periods of duty from B. Yard, known as the Hump, to the Stock

Yards, and to the C. D. Yard, and to Wiggins No. 2. The B. or Hump Yard is on the Illinois Central, located I would say about a mile north of the pump station known as Centerville. The pump station on Illinois Central is about 6 miles from Relay Depot, and the Hump or B. yards is about 5 miles from the Relay Depot. North of the Relay Depot to Junction Railroad, I would say, would be about 2½ miles. In bringing stock or shipments of cars from the B. or Hump Yard down to the Stock Yards, we would travel about 6 or 7 miles, or a little more than that. We have a caboose on that run.

From B. Yard, known as the Hump, it would be a distance of 5½ or 6 miles to Wiggins No. 2 and C. D. We would go by the M. & O. Junction.

[fol. 83] The majority of my work is done from the B. or Hump Yard on our railroad on which we have the caboose. We do switching too in the B. & O. Yards. We do not do any switching between the time we leave our Yard and the time of deliveries.

We make these runs of 6 or 8 miles as continuous from one Yard to delivery point, and do the same coming back. Occasionally I do some switching in the Yards of our company.

We make deliveries from the C. D. Yards to the 6th Street Yard of the Illinois Central and back, and on my run we always have a caboose.

Any crew that we have on the Illinois Central regardless of where they go, wherever it might be, if they want a caboose, they go and get it. We have that agreement with the Illinois Central. We take a caboose on any run we want a caboose on.

Redirect examination.

By Mr. Schwarzbach:

The shortest distance on any run we make is about 2 miles. The switching is practically the same everywhere.

All the testimony I have given is on switching within the State of Illinois.

It was stipulated that the testimony of Mr. Thomas P. Drennan, 658 North 56th Street, East St. Louis, employed by the Wabash Company for twenty-six years, and of Mr. I. E. Hitchens, 1525 North 55th Street, East St. Louis, Illi-

nois, employed by the Pennsylvania Railroad for seventeen years, would be substantially the same as the testimony of Mr. Strike, subject to the same objections and motion.

[fol. 84] William A. Bruce, witness on behalf of complainant, being first duly sworn, testified as follows:

My name is William A. Bruce. I reside at 5131 25th Place, Cicero, Illinois. I have been a switchman for forty-nine years for the Wheeling and Lake Erie Belt Railroad of Chicago, Chicago Junction Railroad and Burlington Railroad, at Chicago but am now retired. I have been Local Chairman representing the yardmen in Chicago on the Burlington, as well as Secretary of the General Grievance Commission of the Brotherhood on the Burlington System. I was Local Chairman since 1906, November, to May 1, 1937, and Secretary from January 1908 to July, 1922.

If I were asked the same questions these witnesses were asked, my testimony would be substantially the same.

I have an opinion as to whether the life, health and safety of the switchmen and employees would reasonably be endangered by the failure to provide cabooses.

If the caboose is provided, it eliminates danger due to clearances. It protects the yardman from the elements, such as wind, rain, storms of any kind, sleet, snow and ice.

In the caboose is provided a place for men to carry extra clothing, and necessary and proper flagging materials.

He does not have to ride on top of the train or on the drawbar in the discharge of his duties, but can discharge his duties from the interior of the caboose or from the steps on the outside.

[fol. 85] He can control backup movements of his train with an air valve provided on the caboose for the purpose of setting the air, setting the brakes. He also can, with a whistle that is provided on the caboose, warn the public at or near crossings.

First aid equipment is provided in the caboose, thereby adding additional safety to the employees.

Markers are lights provided to indicate the rear end of a train moving in a certain direction. In addition to those markers, and in addition to further safeguard the employees on a train from an approaching train, their ability with the use of a caboose to stop or warn an approaching

train is far greater than it is where he is riding on a drawbar or on top of a car.

By clearance is meant, where it will not clear a man on top or on the side of a car.

We have two markers there.

Switchmen can perform their necessary duties far better from the caboose than they can without a caboose.

Mr. R. F. BLACKMAN, witness on behalf of the complainants, being first duly sworn, testified as follows:

My name is R. F. Blackman, and I reside at 355 Locust Street, Clayton, Missouri. I have been employed as a road man by the Alton Railroad for twenty-nine years, in Missouri.

(It was stipulated that the testimony of Mr. Blackman would be the same as Mr. Bruce, subject to the same objections and motions.)

[fol. 86] JOHN A. WICKS, witness on behalf of the Respondent, being first duly sworn, testified as follows:

Direct examination.

By Mr. Campbell:

My name is John A. Wicks. I reside in St. Louis, Missouri. I am employed as Chief Clerk to the General Superintendent of the Terminal Railroad Association of St. Louis, and have been so employed for seventeen years. I have been connected with the Terminal Railroad Association of St. Louis for twenty years.

In addition to handling the general correspondence of the office, I look after all the Labor relations. I have occasion to become familiar with the rules, records and so forth of the Terminal Railroad Association of St. Louis.

Respondent's Exhibit 1 correctly shows the Rules as they exist and have existed for some time. These Book of Rules are distributed to each switchman who signs a receipt, and to other employes.

Respondent's Exhibit 1 for identification, being document containing correct copy of the Rules and Extracts from the application for Employment, was admitted in evidence, marked Respondent's Exhibit 1, No. 26601, 9-14-38, for identification (Rec. p. 1119).

Respondent's Exhibit 2 are copies of miscellaneous rules taken from the Book of Rules and in the Working Time Table, the same Book of Rules referred to with reference to Exhibit 1. They are the current rules in force at the present time and have been in force many years. The [fol. 87] Working Time Table is issued from time to time and is distributed to each switchman and he receipts for it.

Respondent's Exhibit 2 was admitted in evidence and marked Respondent's Exhibit 2, No. 26601, 9-14-38 for identification (Rec. p. 1121).

The Terminal Railroad Association of St. Louis is engaged wholly as a switching carrier engaged in Yard operations.

There are three main Yards on the east side of the river in Illinois, the Madison Yard, Venice, Illinois, the C. D. Yards in East St. Louis, and Wiggins No. 2 in East St. Louis. Also Wiggins No. 5 Yard.

Objection by Mr. Schwarzbach with reference to Yards on the west side of the river, as it is outside the State of Illinois.

Objection sustained.

The general nature of the switching operations so far as freight is concerned in the State of Illinois is breaking up and assembling of trains, deliveries from one yard to another, or from our Yards to Yard connections,—trunk lines. We take cars from one trunk line, bring them into our Yard, classify them, break them up and deliver to another Yard or Yard connection. All in the State of Illinois.

Respondent's Exhibit 3 for identification contains in the first instance a true and correct copy of Rule 101 and 109 of the current Book of Rules and Rule 308 as contained in the current working Time Table, being the same Book of Rules referred to in relation to the other exhibits.

Respondent's Exhibit 3, No. 26601, 9-14-38, for identifica- [fol. 88] tion, was offered and received in evidence and marked Respondent's Exhibit 3 (Rec. p. 1124).

Respondent's Exhibit 4 is the standard form of Application for Employment which must be filled out and signed

by each switchman before he enters the service. This form is currently in use, and has not been revised in the last five or six years.

Respondent's Exhibit 4 was offered and admitted in evidence and marked Respondent's Exhibit 4, No. 26601, 9-14-38 (Rec. p. 1125).

Respondent's Exhibit 5 is a general notice issued by the Assistant Superintendent in charge of the Merchant's District, directed to all members of train crews under his jurisdiction, outlining the running time allowed under normal conditions from one point to another. It was issued July 20, 1927, and is in full force and effect at the present time. These notices are mailed to each individual switchman who receipts for same.

Objection by Mr. Schwarzbach with reference to anything pertaining to Missouri.

Mr. Campbell: I am doing this to find out which are in Illinois.

Mr. Schwarzbach: That is perfectly all right, Mr. Campbell.

The following refer to movements between Yards in Illinois, Rose Lake and Madison Yard, C. P. Junction and Valley Junction, Wabash Granite City Yard and Madison Yard, A. & E. Connection Granite City and Madison Yard, C. P. Junction and Dupo Yard, Dupo Yard and Madison Yard, C. P. Junction and Valley Junction, Valley Junction and Madison Yard, Madison Yard and A. E. Connec- [fol. 89] tion Granite City, Madison Yard and Wabash Granite City Yard, Wabash Granite City Yard and Madison Yard, C. P. Junction and Pennsylvania Yard Rose Lake, Rose Lake and Madison Yard. The Transmississippi runs run across the Mississippi River by maens of the Merchants Bridge.

Objection by Mr. Schwarzbach with reference to Eads Bridge going over the river into Missouri. Overruled.

In practically every one, the movement transriver would be via the Merchants Bridge. There would be other runs that would go over Eads Bridge.

Exhibit 5 was admitted in evidence with the understanding that only the Illinois portion will be admitted.

Mr. Campbell: I am offering the whole Notice.

Mr. Schwarzbach: I object, because more than half are Missouri runs.

Mr. Campbell: We are entitled to have the whole Notice in.

Asst. Comr. Nyka: The testimony shows which ones of these run into Missouri and which into Illinois. The Commission will take notice of those in Illinois. It may be filed for the information of the Commission.

Mr. Schwarzbach: I have no objection, with that understanding.

Whereupon, the said document was offered and received in evidence, marked Respondent's Exhibit 5, No. 26601, 9-14-38 (Rec. p. 1126).

Respondent's Exhibit 6 is similar to the previous Exhibit in that it sets out the standard reasonable running time [fol. 90] under ordinary conditions between the C. D. Yard and various connections specified. It is General Notice 438, dated June 25, 1930, delivered to switchmen and other people working in the Yards the same as the other notices. All movements are entirely in Illinois.

Whereupon, Respondent's Exhibit 6 was offered and admitted in evidence, marked Respondent's Exhibit 6, No. 26601, 9-14-38 (Rec. p. 1127).

Respondent's Exhibit 7, purporting to be General Notice 461 is a later issue of the preceding Exhibit, and supersedes General Notice 438 referring to the same movements, all in the State of Illinois. My testimony is the same regarding this Exhibit 7 as it was regarding Exhibit 6.

Respondent's Exhibit 7 was offered and admitted in evidence, marked Respondent's Exhibit 7, No. 26601, 9-14-38 (Rec. p. 1128).

Respondent's Exhibit 8 is another scheduled running time under ordinary conditions, issued either at the time or after the time the Pennsylvania installed its inspection pit in Rose Lake Yard. This is dated May 12, 1932. It is a general notice the same as the other general notices served on the men in the Yards.

Whereupon, Respondent's Exhibit 8 was offered and received in evidence, marked Respondent's Exhibit 8, No. 26601, 9-14-38 (Rec. p. 1129). Respondent's Exhibit 9 is a general notice setting the running time under reasonable conditions between the C. D. Yard and Southern Company Yard, involving movement between the two Yards in the State of Illinois. The notice is dated July 8, 1932. It is a

general notice the same as the other general notices testified to above.

Whereupon, Respondent's Exhibit 9 was offered and [fol. 91] received in evidence, marked Respondent's Exhibit 9, No. 26601, 9-14-38 (Rec. p. 1130).

Respondent's Exhibit 10 is a tabulation of the movements ordinarily made by switching crews from our three major Illinois Yards to various connections. It shows in each instance, the name of the road, the distance traveled and location of the connection. Attached to it are copies of letters from engineers, and so forth, of other railroads as to the distances, where the runs are over these particular railroads. Some of the moves involved contemplate movement not over our rails, but foreign lines, also. Inasmuch as our Engineering Department was not able to give us that information, we requested it from the lines involved. In arriving at the distances between Yards, they measure from the end of one Yard to the beginning of the other, that is from the last switch in one Yard to the first switch in the other.

Mr. Schwarzbach: For the purpose of the record, I would like to say that these letters are not proper testimony.

Respondent's Exhibit 10 was offered and received in evidence, marked Respondent's Exhibit 10, No. 26601, 9-14-38 (Rec. p. 1131).

Respondent's Exhibit 11 is a map taken from the records of the Terminal Railroad Association.

Ira Davis, witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Campbell:

My name is Ira Davis. I am superintendent for the Terminal Railroad Association of St. Louis. I have been [fol. 92] with the company for thirty years, and have been superintendent for fourteen months.

Whereupon, Respondent's Exhibit 11 was offered and received in evidence, marked Respondent's Exhibit 11, No. 26601, 9-14-38 (Rec. p. 1137).

Respondent's Exhibit 12 represents a map of C. D. Yard in East St. Louis; all of our facilities in East St. Louis.

Respondent's Exhibit 12 offered and admitted in evidence as Respondent's Exhibit 12, No. 26001, 9-14-38 (Rec. p. 1138).

Respondent's Exhibit 13 is a map of Wiggins No. 2 Yard and all the connections on Front Street and north of Front Street. Front Street runs parallel with the Mississippi River from Twendley Avenue to the City Water Works. All in the State of Illinois.

All three of the maps are scaled 1 inch to 50 feet.

Respondent's Exhibit 13 offered and admitted in evidence as Respondent's Exhibit 13, No. 26601, 9-14-38 (Rec. p. 1139).

JOHN A. WICKS, witness on behalf of the Respondent, being first duly sworn, testified further as follows:

Direct examined (Resumed).

By Mr. Campbell:

Respondent's Exhibit 14 is a General Order designed to acquaint the men with changes made in the Relay Depot Territory through installation of new modern type signaling. It is dated June 9, 1938, and was effective at 10:00 [fol. 93] A. M. June 11, 1938. This general order was delivered to all the switchmen and people working in the Yards in that territory. It is in force and effect at the present time. I am sure this order was brought to the attention of the men, but we did not furnish each employe with a copy.

Respondent's Exhibit 14 was offered and admitted in evidence as Respondent's Exhibit 14, No. 26601, 9-14-38 (Rec. p. 1140).

Respondent's Exhibit 15 consisting of two pages purports to show the Average Monthly Temperature in St. Louis across the river from East St. Louis, from January, 1927 to December, 1936. These figures were obtained direct from the United States Weather Bureau Records, at St. Louis, Missouri.

Mr. Schwarzbach objects to Exhibit 15 for the reasons it is the temperature at St. Louis and not in Illinois, and

it is an average temperature which is not material because it does not give high and low. These fellows are compelled to work under high and low, and not under averages. We are not dealing with averages. The temperature given here for January, 1927, is 31.6, and maybe on January 7th, it might have been five below zero. How will that help? I can't see that it is material. Objection sustained.

Objection sustained.

Respondent's Exhibit 15 was offered and admitted subject to Mr. Wick's furnishing the minimum and maximum temperatures from January 1927 to December, 1936 (Rec. p. 1141).

[fol. 94] Respondent's Exhibit 16 consisting of four pages, shows the extent of the deliveries that we have to make to the trunk lines out of the C. D. Yard territory, in which territory the icehouse is located and the perishable freight is congregated for classification to these lines.

Objection by Mr. Schwarzbach to questioning of witness on the ground that they are simply taking one particular day and there is no testimony to show that is a fair average, and for the further reason that this is after the petition was filed. There is no testimony to show that this is a fair average. Maybe on June 6th there might have been ten times as much.

The Witness: The second page of the exhibit is a list of the cars received from various connecting lines included in the deliveries made and shown on the preceding page. The third page of the exhibit represents deliveries made from C. D. Yard for the 2:00 A. M. fast freight trains. Page 4 of the exhibit represents receipts for the trains and is equivalent to page 2 of the exhibit.

We picked out June 9th or June 10th for the purpose of making this detailed record because I thought these days were representative days of the week.

Objection by Schwarzbach to admitting this Exhibit 16 in evidence.

Asst. Comr. Nyka: It may be admitted for what it is worth. The testimony shows that is the general average during the summer months.

[fol. 95] Cross-examination.

By Mr. Schwarzbach:

They are representative days of the week. Our traffic varies somewhat. Monday is light and Tuesday not so good. The end of the week our traffic will run, so far as days are concerned, about the same on the same days of the week. June 9th was Thursday—June 10th would be Friday. Our traffic in June 1937 was over that of 1938. It was eighteen per cent better in 1937. Thursday and Friday in February, 1938 would not be typical because the amount of perishable traffic does not move in February.

Whereupon, Exhibit 16 was admitted in Evidence, subject to objection (Rec. p. 1143).

Respondent's Exhibit 17 was offered in evidence. It is a statement by Mr. Campbell of an agreement made with the Assistant Secretary of Agriculture in January, 1915.

Objection by Mr. Schwarzbach to Exhibit 17, on the ground that it is not material to the issues.

Asst. Comr. Nyka: I think this is backed up by sufficient testimony to allow it to go in for what it is worth.

Mr. Schwarzbach: Subject to my objection?

Asst. Comr. Nyka: Yes. Exhibit 17 may be filed and admitted.

Whereupon, Respondent's Exhibit 17 was filed and admitted in evidence and marked Respondent's Exhibit 17, No. 26601, 9-14-38 (Rec. p. 1147).

Respondent's Exhibit 18 was offered in evidence.

[fol. 96] Mr. Schwarzbach: I will make the objection that it is absolutely immaterial, in my opinion, when it comes to the question of safety. If it were a question of rate increase, it would be very material, but for the purpose of safety to the switchman and the employes and the public, the question of cost is not material. There are a number of cases along that line. I object very strenuously to it.

Objection overruled.

Respondent's Exhibit 18 was admitted in evidence over the objection of Mr. Schwarzbach, and marked Respondent's Exhibit 18, No. 26601, 9-14-38 (Rec. p. 1148).

Respondent's Exhibit 19 was offered in evidence. Objection of Mr. Schwarzbach on the ground that it is a blunt statement, and is absolutely immaterial.

Objection sustained and Respondent's Exhibit 19 refused.

Cross-examination.

By Mr. Schwarzbach:

By Yard operations we mean what is generally implied by the term "Yard operations," which does not mean any trunk line operations. It does mean transfer service.

Switchmen would not need a caboose to carry notices and orders issued by the company.

Very few of the lines around St. Louis use cabooses in delivery to us.

[fol. 97] William E. Howald, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Campbell:

My name is William E. Howald. I reside in Richmond Heights, Missouri, immediately west of St. Louis. I am employed by the Terminal Railroad Association of St. Louis as Chief Clerk, Auditor, Secretary and General Accountant. We supervise and do the accounting, keep the payrolls, compile the payrolls, compile all financial statistics of the Company and assist in supervising the financial affairs of the company.

To the best of my knowledge and belief the exhibits presented were taken from the actual financial accounting records of the company and are correctly transcribed.

Respondent's Exhibit 20 is a Statement of Revenue Cars Handled from January 1, 1931, to August 31, 1938, by months and recapped by years.

Objection by Mr. Schwarzbach on the ground that Exhibit 20 is not material.

Mr. Campbell: It is offered solely on the financial question.

Mr. Schwarzbach: May I have the record show that I am objecting to all these exhibits with reference to the financial affairs of the company without making an objection for each one? Is that agreeable?

Asst. Comr. Nyka: Yes. The objection is overruled and Exhibit 20 may be filed and submitted.

Whereupon, Respondent's Exhibit 20 was admitted in evidence (Rec. p. 1150).

[fol. 98] Exhibit 21 is a graph exhibit and is supplemental to Exhibit 20, showing practically the same information as is shown on Exhibit 20 by a graph chart.

Objection by Mr. Schwarzbach to Exhibit 21. Objection overruled.

Whereupon, Respondent's Exhibit 21 was admitted in evidence (Rec. p. 1151).

Respondent's Exhibit 22 is headed: "Terminal Railroad Association of St. Louis, Auditor's Office. Income Statement for Seven Years Ended December 31, 1937." This is taken from the books of the Company.

Objection to Exhibit 22 by Mr. Schwarzbach on the ground that it is immaterial. Objection overruled.

Whereupon Respondent's Exhibit 22 was admitted in evidence (Rec. p. 1152).

Respondent's Exhibit 23 is a Consolidated Comparative Income Statement for the month of July, 1938, as compared with 1937, and for the seven months prior to July 31, 1938, compared with 1937.

Same objection by Mr. Schwarzbach.

Asst. Comr. Nyka: It may be filed, subject to the same objection.

Whereupon said document was admitted in evidence and marked Respondent's Exhibit 23 (Rec. p. 1153).

Respondent's Exhibit 24 is a Comparative Consolidated General Balance Sheet as of July 31, 1938, showing the comparative increase or decrease with the same date of July 31, in 1937.

Same objection by Mr. Schwarzbach.

Asst. Comr. Nyka: It may be admitted.

[fol. 99] Whereupon, the said document was admitted in evidence and marked Respondent's Exhibit 24 (Rec. p. 1154).

Ira Davis, witness on behalf of the respondent, having been previously sworn, resumed the stand and testified as follows:

Direct examination.

By Mr. Campbell:

I am Superintendent of the Terminal Railroad Association of St. Louis and have been for fourteen months. I was Train Master seventeen years before that, and General Yard Master before that, Assistant Yard Master before that, Yard conductor before that and switchman before that.

Exhibit 10 is the exhibit that covers the distances, and so forth, from C. D. Yard to various connections, from No. 2 Yard to various connections; and from Madison Yard to various connections. I am familiar with those runs.

In the movement from C. D. Yard to M. & O. connection, we arrive at C. D. Yard at a distance of about 1000 feet south of the Relay Depot, proceed south to an interlocking plant over an under-pass, Broadway, south over a double-track railroad to M. & O. Junction where we hit the M. & O. rails, and proceed to the end of their Tolson Yard, which is a distance of about 10,000 feet from the time you start until you get to the Yard. The train is made up in our East-bound Yard, and there is a certain track in that Yard that is assigned for the assembling and classification of cars that are to go to the M. & O. at Tolson. The switching crew gather up the cars from wherever they are and put the M. & O. cars on that track, then the engine is coupled on, [fol. 100] the track is coupled up and the air is made ready before they proceed. The air is coupled one hundred per cent. It is about quarter of a mile south from C. D. Yard to Relay Depot. You go through the interlocking plant. You go over Broadway Street which we used to go under on account of a structure over the tracks which has been

removed, and we have now an overpass over the top of the street.

In going through the interlocking plant, there is one bridge signal at the B. & O. crossing—it all depends on what move you are making. If we were going on Track 17, it would be governed by two pot signals controlling the movements up the Eads Bridge approach; and also, the tracks cutting in across the L. & N. crossing at the overpass. The signals are operated by hand. They are interlocking signals, not automatic signals. A pot switch is a signal located about 2 feet from the top of the ground. We call them daylight signals.. It is a steel structure. The signal is about 2 feet high setting on a concrete block, about 4 feet from the nearest rail on the track.

The new subway under the tracks at Broadway has been completed and the changes in the Railroad that were made necessary by it have been all completed, so that the situation is no longer there of going past the construction work. All the hazard is out. Pot switches are usual in interlocking plants, but unusual in switching Yards. Hand-thrown switches are usual in the C. D. Yard. They are set right in the ground and are worked by hand.

Crossing watchmen are situated at Missouri Avenue twenty-four hours a day and at Twendley Avenue ten hours a day, during the daytime.

[fol. 101] When a train is coupled to one hundred per cent air, an emergency stop is made when a train breaks in two and the air hose becomes disconnected between two of the cars, and that applies air to everything on the train automatically.

There are about four or five movements every twenty-four hours in each direction between C. D. Yard and M. & O. connections. Sometimes there may be 50 cars used on this movement and the next time not over five.

In connection with movements from C. D. Yard to Southern Railway connections we deliver cars at Denverside Yard, and we make the same movement as we do on the M. & O. until we get to Broadway. The switch leading to the Southern's main line is right on top of the bridge, of the overpass. We travel on our tracks a little over 1,000 feet and it is just south of Broadway that we turn off.

The movement on the Southern Railway is from 3rd to 27th Streets. We are on the main lines of the Southern in traveling to the Coapland or Denverside Yards. There are

four passenger trains a day on the Southern Railway, two each way.

We cross a good many streets in going to the Southern. We cross 3rd Street, 4th Street, 6th Street, 10th Street, 15th Street and 27th Street goes over the top. Between 15th Street and the east end of the Coapland Yard, there are no grade crossings. 15th Street is the last grade crossing. At 27th Street there is an overhead structure over the Southern Railway tracks.

With reference to the delivery to the Illinois Central from C. D. Yard, they are made at the 6th Street Yard and [fol. 102] some call it the Old Lumber Yard.

We take the same route on this movement that we take on the Southern Railway delivery only in the opposite direction. It would move southbound, and when we get to the junction with the Southern Railway track, we would go south over what we call Twendley Avenue and turn east on to the I. C. tracks and we would go to 6th Street. When we turn east we follow the same route as to the M. & O., turning over before we get to the M. & O. Junction, and then we go three blocks east on I. C. tracks to the delivery point. We cross Twendley Avenue and Missouri Avenue with the I. C. delivery.

With reference to the delivery to the Pennsylvania at the Rose Lake Yard from C. D. Yard, we pull out of C. D. Yard south, we turn east immediately after we get out, in the head of the Yard around a Wye movement and proceed north. We hit the Pennsylvania tracks about 1,000 feet from the time we leave our Yard and turn north, move directly north over one high, one street crossing through the interlocking plant, the Willow Plant, and head into Rose Lake Yard, about 3.2 miles.

We cross St. Clair Avenue over the top. Two tracks are completed and two are under construction. When the other two tracks are completed we will use what we call a running track parallel with the main line for freight trains only.

We go over the top of the 9th Street subway on that trip.

We have a crossing watchman at Bowman Avenue and

[fol. 103] Exchange Avenue, the two grade crossings on that run.

The air is coupled on the Pennsylvania runs, I. C. runs and Southern runs one hundred per cent, the same as on the M. & O. runs.

We deliver stuff to the Lower Yard of the L. & N. and we deliver into their Train Yard.

We go south about 600 feet, south to the Relay Depot and connect with L. & N. on Broadway. The switch leading to the L. & N. Freight House is on top of the bridge. We usually shove the cars right down to the freight house.

When we deliver to the 2nd Street Yard over B. & O. rails, we turn east and go the same route we go with the Pennsylvania delivery until we get to the junction leading to the tracks, and in place of turning to the north, we go straight east.

The Big Four practically connects with ours. There is only 500 feet difference between the Yards. If delivery is made out in our Old Yard, we can pull or shove into their Yard. If it is made up in the Eastbound Yard, we have to pull out and shove or pull it to the Old Yard. The same applies on the Wabash. The air is coupled up on the L. & N., Big Four and Wabash the same as described in the other runs.

On the C. & A.-B. & O., the Yard is about 500 feet further. The same movement is made as on the Big Four and Wabash.

On the Litchfield & Madison, we deliver and receive from the C. D. Yard.

The Nickel Plate and C. B. & Q. are practically the same as Litchfield. We deliver the loads to them and they pull them.

[fol. 104] We deliver direct to National Stock Yard from C. D. Yard, crossing St. Clair Avenue. The Yards are 425 feet apart.

With reference to the signals at Relay Depot, in the early part of last spring, we started a program of a million dollars and a half, to reconstruct our interlocking plants over the entire system, which had become obsolete and of old date. The East St. Louis interlocking plant is one of the first and the work has proceeded faster there. All of these old bridge and single signal poles controlled by arm have been removed and new daylight signals have taken their place. The majority of them had been there thirty years or more.

The other bridge I am referring to will be torn out in the next thirty days.

Other railroads come into our C. D. Yard with their own engineering equipment.

The Illinois Central coming into our C. D. Yard uses a caboose. The other railroads make identically the same move as we do.

Movements go to and from St. Louis, to and from the C. D. Yards.

Objection by Mr. Schwarzbach. Objection to anything going to St. Louis. Objection sustained.

Two bridges cross the Mississippi River called the St. Louis Merchants and Eads Bridge that are used by the Terminal. The Eads Bridge is located east of Washington Avenue. The approach hits the surface at Missouri Avenue right at Relay Depot. There are two tracks on the bridge. Bridge fronts on Wassington Avenue. The two [fol. 105] tracks on Eads Bridge are all the way across the river.

Objection by Mr. Schwarzbach to anything about the Missouri side.

Mr. Campbell: I offer to prove by this witness, that the Eads Bridge runs from the Illinois shore to the Missouri shore; that it is a steel and iron structure; that there are two railroad tracks extending from the Illinois shore to the Missouri shore of the bridge; that those tracks are used every day by sixty-four passenger trains and about an equal number of freight movements; that the State Line is the middle of the Mississippi River, which at the Eads Bridge, is about the middle of the Yard, from bank to bank; that in movements over the Eads Bridge from Missouri to Illinois and from Illinois to Missouri, the entire movement is Interstate Commerce.

Mr. Campbell: I want to make a further offer,—that if an order were entered by this Commission, requiring a caboose from a point in Illinois to the middle of the river or from the middle of the river to a point in Illinois, it would be impossible and impracticable, with all the trains on those main tracks on the bridge, to cut off the caboose at the middle of the river; that the only practical way that order could be complied with would be to have another engine follow the train to the middle of the river, uncouple the caboose and take it out of the way of the other train; and that if a caboose were required from the middle of the river to a point in Illinois or from a point in Illinois to the middle of the river, as a practical railroad proposition, it

would require that we carry the caboose on; either put it [fol. 106] on in Missouri on a movement to a point in Illinois, or take it to Missouri on a movement from Illinois to Missouri.

I am contending in this case, that this Commission cannot enter an order that would require a caboose on a train across the river. It has no jur-sdiction in that.

Asst. Comr. Nyka: If such an order were entered, it would be up to the railroad to do what they want after they reach the center of the river.

Mr. Campbell: That is what I want to show. We can't do anything with it after carrying it to the point where the Commission has no jurisdiction to enter an order.

Asst. Comr. Nyka; The Commission has jurisdiction over the subject matter. What happens beyond the jurisdiction of the State, we are not concerned with. We don't know what ruling will be given, until all the evidence is in.

Mr. Schwarzbach: We are making a formal objection to all testimony that goes beyond the Illinois side. We will save a lot of time that way.

Ass-. Comr. Nyka: The Commission will rule on that question when the time comes up for argument in the case.

The Witness: There are two main tracks on the Eads Bridge. About sixty-eight passenger trains cross Eads Bridge each day. The latter part of the week the freight movements will exceed the passenger movements. In the early part of the week they are about the same.

It would not be possible to cut a caboose in the middle of the river. We have no place to do it. Two trains would tie up the main tracks.

[fol. 107] The only practical way of doing that would be to start in Missouri on a movement to Illinois at our Yard and bring the caboose the whole way, or from Illinois to Missouri to take it to Missouri. The same situations would apply to the Merchants Bridge.

We do not haul anything over those bridges that is not a movement in Interstate Commerce.

If we had to have a caboose in crossing either the Merchants or Eads Bridge, in an eastbound move, there would be a delay of about thirty minutes. In a westbound move, it is impossible.

The Red Ball carrying perishable freight goes out about 11:00 o'clock in the morning. The 2:00 A. M. trains are the same class, carrying perishable freight, high class. It

is not possible to bring over all the freight at once. We handle it as it comes in and deliver it as it comes in.

Some of the maximum time permitted as to deliveries under the 28-and-36 hour law are from the Missouri & Pacific at Valley, Illinois, two hours and thirty minutes; from the Cotton Belt to National Stock Yards, two hours. Those are the two principal runs on the east side. That contract was entered into with the Bureau of Agriculture through the Interstate Commerce Commission.

Mr. Schwarzbach: I object to that. The agreement is the best evidence, and not the testimony of Mr. Davis.

Objection sustained.

Mr. Campbell was ordered to proceed with the understanding that he would produce the agreement at the next hearing.

Over in Missouri the scheduled time is two hours from [fol. 108] the Missouri & Pacific to the National Stock Yards; two hours from the M. K. T. to the National Stock Yards; one hour and thirty minutes from the Rock Island to the National Stock Yards; and one hour and thirty minutes from the Wabash West to National Stock Yards.

Sometimes we have plenty of time to bring them over and sometimes we are late.

Nine times out of ten we have to send a special engine for the stuff.

With reference to the Red Ball runs, Pacific 56, that is one of the heaviest trains we have for trans-Mississippi movement. It carries livestock and perishable freight and is due in St. Louis at 9:30. It has to go out on the 11:30 train in the morning, and is delivered to us in fifteen minutes after it arrives, at about 9:45. It has to be at the Pennsylvania by 11:00 o'clock.

It would almost be impossible, with a forty-car train, to double to a caboose, because forty cars is as many as we can handle west bound. In about 500 feet we enter a tunnel a mile long; and to double to a caboose, we would have to put it on from the west end of a 100-car train, which would mean moving sixty cars, and more time would be consumed by that than it would take to be in East St. Louis and have the train switched. There would be an average delay of about forty minutes.

There are no cabooses on any of the runs into the C. D. Yard.

With reference to the C. & A.-B. & O. they are almost parallel with our No. 2 Yard. We make deliveries on both roads as if they were one. It can be either pushed or pulled [fol. 109] but it is mostly pulled. We have a contract with the Bureau where it says we shall not shove cars from one Yard to another when it can be prohibited.

With reference to Litchfield & Madison, C. B. & Q. and Wabash East, deliveries are shoved in substantially the same as C. & A.-B. & O.

The Big Four from No. 2 Yard, is usually shoved. Sometimes it is pulled out and run around and shoved in. We go south on the levee about 3000 feet. The delivery is made substantially the same as the others.

The M. & O. and the Southern deliveries are made the same way, all deliveries being made practically along the bank of the river, with the exception of the Illinois Central.

The delivery from No. 2 Yard to Madison Yard moves northerly over a double track connection between the Madison Yard and No. 2 Yard. It moves over a double-track railroad that we have with approaches to the Merchants Bridge, which is a trans-Mississippi move to and from South St. Louis, going over the top of the B. & O. at Venice.

On the Missouri Pacific to Dupo Yard delivery, we go southwardly over a double-track railroad into Dupo Yard, a distance of about 8 miles. We have cabooses on this run six months of the year, from October 15th and six months on.

We have cabooses on all trans-Mississippi runs for six months in the year.

We do not have cabooses on the C. & A-B. & Q., L. & M., Wabash East, C. B. & Q., Big Four, M. & O., Southern, I. C. and Madison Yard.

On the Cotton Belt at Valley Junction movement, we go [fol. 110] southerly over the Conologue main line to a place called Monsanta, turn east and go through a cut-off there to Valley Junction, a distance of about 4 miles.

We have a caboose on the run to the East St. Louis Stone Company all year around.

We go south over the Conologue main line, the same route as we take to Dupo to get to the Phillips Petroleum Corporation.

Monsanto Chemical Company, that is on the route we go to the Cotton Belt, about half the distance between Cono-

logue main line and Valley Junction, a distance from No. 2 Yard of about 3 miles.

We go to the Cahokia Power Plant from M. & O. Junction. We use M. & O. rails. We lease their track and pay them so much a car.

There are no cabooses on the Cotton Belt run.

There is a caboose on the East St. Louis Stone Company run.

There are no cabooses on the Phillips Petroleum run, the Monsanto Chemical Company run, nor the Cahokia Power Plant run.

We go south over Illinois transfer to a distance of about 3½ miles to get to the St. Louis & O'Fallon place.

The Belleville Electric is farther south, about a mile farther on the Illinois Transfer, and the Alton & Southern is about another mile further. Cotton Belt and Illinois Central, at Valley Junction are still farther. The Missouri Pacific at Dupo is 6 miles farther on the same route.

We have a double-track system between the two tracks [fol. 111] used solely for movement of freight for deliveries for C. D. Yard from Madison Yard.

We deliver to the Wabash at Brooklyn. We go from Madison Yard to the industries. It depends on what industry is farther away, as to how the train will move. We have what you call east and west side crews. The east side will leave for Granite City Steel and uses no interlocking plants. The west side man will go through the interlocking plants and sets his stuff out for another Steel Company; and so for all these industries.

The Granite City Tower is for a lot of industries in Granite City and for inbound and outbound freight trains and inbound and outbound passenger trains. It is an awfully heavy move.

We have cabooses on the Dupo run moving over Illinois Transfer, the year round. We have industrial crews working six days a week, with cabooses the year round. We give cabooses six months of the year for the connections south of the Belleville Electric. That would include I. C., Cotton Belt and Alton & Southern.

We do not have cabooses on the St. Louis & O'Fallon and Belleville Electric runs, Missouri Pacific to the C. D. Yard, or to the Wabash, to Granite City Tower, the Coke Plant, the L. & M., Nickel Plate, Illinois Traction nor the Illinois Central North.

About ninety-eight per cent of the runs shown on Exhibit 10 contain cars that are being transported into interstate commerce.

Objection by Mr. Schwarzbach.

About fifty per cent of the cars contain interstate commerce.

We don't have air on many of the movements out of No. [fol. 112] 2 Yard, only the through movements. We have air on all the trans-Mississippi movements out of No. 2 Yard, on all the I. C. cuts, all Missouri Pacific cuts and all the Madison Yard cuts. There is air on the Cotton Belt, Phillips Petroleum Company, Cahokia Power Plant. It is not done on the Southern, the M. & O., the Big Four, C. B. & Q., Wabash East, L. & M., C. & A.-B. & O.

We have air on everything but the Nickel Plate, Illinois Traction, Litchfield & Madison and on the Terminal for East St. Louis.

The Pennsylvania and the C. & E. I. have cabooses when they come into the Madison Yard. The Pennsylvania comes from Rose Lake Yard and the Illinois Central comes from their new Yard at Centerville. The C. & E. I. comes from Mitchell which is about 14 miles. It is about 6 miles from the new Yard of the I. C. to where they come into our Yard. It is 3½ miles from Rose Lake Yard of the Pennsylvania when they make those movements.

With reference to the various industries at Granite City it is regular routine movement in the switching we do into the plants. All of the cars are taken up to 16th Street together.

On that run in shoving around 16th Street, there is no trouble with the visibility of the members of the crew in passing signals if they are in their proper places.

There is nothing on a freight car to give signals by air.

Where the railroad crossing is not interlocked, there is always a sign "Stop" within the required distance of the law, and then you proceed.

[fol. 113] Practically all of the crossings on the Illinois Transfer are protected by interlocking. At the C. P. Junction, we have the I. C., Nickel Plate, T. & Eastern and they are not protected by interlocker, but a hand signal controls the crossing twenty-four hours a day. We go to East St. Louis and the Southern is not protected by interlocker. We

stop and acknowledge the crossing as the law requires. The L. & N. going south is not protected by interlocker and we acknowledge that crossing in the same way.

I was one of the first men that had a caboose on the Terminal Railroad, on the Conologue in 1910. They had a caboose for the day crew and night crew. I happened to be on the night crew.

We got cabooses on all our Dupo runs out of C. D. Yard at that time. As the years went by and business picked up, we got them on other runs, and finally got cabooses in Madison Yard. For years we had cabooses on all transfer crews in the Wiggins Yard winter and summer, from South St. Louis to No. 2 Yard. When the Wiggins Yard consolidated with the Terminal Railroad, the General Chairman requested that cabooses be given to other places on the property, which was granted, and other cabooses in the summer time were conceded.

We went from about three when I started, to about thirty-one cabooses now. That is the history of the caboose question. Five regular runs have cabooses the year round, but there is no regular run out of the C. D. Yard district with cabooses.

Everything out of Wiggins No. 2 Yard that is trans- [fol. 114] Mississippi has cabooses, and everything from Dupo Yard has cabooses the year round. Everything, every run that goes trans-Mississippi over the Merchants Bridge out of the 11th Street District has cabooses the year round, or six months in the year.

Through all interlocking plants it is necessary for men on these runs to ride on top of the cars.

Asst. Comr. Nyka: What do you mean by interlocking plant?

The Witness: Where the switch is controlled by a man in the tower and the train is moved solely by signals, interlocking signals.

There would be a forty minute delay the round trip if cabooses were put on these runs. That forty minute delay would cost us $10.00 each round trip. If cabooses were granted the cost for the first year would be the greatest, $400,000.00.

Mr. Schwarzbach: I object to that as being a conclusion. There is no foundation laid for it.

Objection overruled.

A. After the first year the cost would be $250,000.00. That is based upon the number of our runs at $10.00 per run.

A caboose would be necessary in order to properly protect the safety of switchmen in one or two runs only. The rest would not be helpful one bit. The Cotton Belt has a run that a caboose would help out in.

The book handed to me is the current agreement with the yardmen and switch-tenders, signed by J. A. Madison, General Manager on behalf of the company and R. L. Cameron, as General Chairman, J. E. Schmeling, General Secretary; F. O. Ennos, Vice Chairman and F. D. Krueger, for the Bureau.

[fol. 115] Mr. Campbell: We offer in evidence from that Book of Rules, Article XXII reading as follows:

"(a) Yard men will be furnished cabooses properly equipped for through long service.

"(b) Cabooses will be furnished during all periods of the year to crews on the Central Belt, Falling Springs Branch, Cotton Belt Florida Street merchandise run, and on through trains between Madison Yard and Dupo. Cabooses will be furnished other crews now enjoying them between October 15th and May 1st of each year."

Mr. Schwarzbach: I am objecting to that as being immaterial. The only question is the safety of the men, and not the agreement.

Objection overruled.

Mr. Campbell produced the income statement for the two years 1928 and 1929, Respondent's Exhibit 25.

Objection by Mr. Schwarzbach for same reasons heretofore submitted.

Mr. Daley: It may be admitted subject to the objection.

Whereupon the document was admitted in evidence and was marked Respondent's Exhibit 25 (Rec. p. 1155).

Mr. Campbell produced a statement of taxable income reported on federal income tax returns for ten years ended December 31, 1937, Respondent's Exhibit 26.

Objection by Mr. Schwarzbach for same reasons heretofore submitted.

Document admitted subject to objections.

Whereupon said document was admitted in evidence and [fol. 116] marked Respondent's Exhibit 26 (Rec. p. 1156).

Mr. Campbell produced separate statements showing the same information as shown on Exhibit No. 26, except for the years 1928, 1929, 1936 and 1937, Respondent's Exhibit No. 27.

Objection by Mr. Schwarzbach for the same reasons as heretofore.

Whereupon said document was admitted in evidence and marked Respondent's Exhibit 27, subject to the objections (Rec. p. 1157).

Mr. Campbell produced temperature readings from January, 1927 to December, 1931, taken from the records of the United States Department of Agriculture Weather Bureau, St. Louis, Missouri, showing the actual minimum, maximum and mean temperatures at St. Louis, Missouri, for the years 1927, 1928, 1929, 1930 and 1931.

Whereupon said document was admitted in evidence and marked Respondent's Exhibit 28 (Rec. p. 1158).

Mr. Campbell produced a similar document showing similar information for the year 1933.

Whereupon said document was admitted in evidence and marked Respondent's Exhibit 29 (Rec. p. 1159).

Mr. Campbell produced a pamphlet showing the same information as the copies heretofore introduced except it is for the year 1932.

Whereupon said document was admitted in evidence and marked Respondent's Exhibit 30 (Rec. p. 1160).

Mr. Campbell produced a pamphlet showing the same information as the copies heretofore introduced except that it covers the year 1934.

[fol. 117] Whereupon said document was admitted in evidence and marked Respondent's Exhibit 31 (Rec. p. 1161).

Mr. Campbell produced another document, being the same information from the Weather Bureau except for the year 1935.

Whereupon said document was admitted in evidence and marked Respondent's Exhibit 32 (Rec. p. 1162).

Mr. Campbell produced another pamphlet presenting the same situation of temperature except for the year 1936.

Whereupon said document was admitted in evidence and marked Respondent's Exhibit 33 (Rec. p. 1163).

Mr. Campbell produced another pamphlet presenting the same situation of temperature except for the year 1937.

Whereupon said document was admitted in evidence and marked Respondent's Exhibit 34 (Rec. p. 1164).

Mr. Campbell produced a document purporting to be an agreement between the Bureau of Animal Industry, Department of Agriculture of the United States and the Terminal Railroad Association relative to the time to be taken with livestock on the 28 and 36 hour law.

Objection by Mr. Schwarzbach for the reasons already assigned and as being immaterial to the issues in this case.

Whereupon said document was admitted in evidence and marked Respondent's Exhibit 35, subject to the objections (Rec. p. 1165-1170).

[fol. 118] Cross-examination.

By Mr. Schwarzbach:

There is a crossing watchman at Trendley Avenue. He is an Illinois Central employee.

In traveling on the Southern Railway where we go on the Southern to the Coapman Yards we use the main line of the Southern. The Southern does not use a caboose there. They do not use a caboose in transfer service.

The Illinois Central does use cabooses on the joint main line between Broadway and Trendley Avenue.

Automobile traffic is quite heavy along the line at St. Clair Yards leading to St. Clair Yards and packing plants. There is a private crossing about 100 feet north of St. Clair there and lots of stock goes over that cutoff.

Our men do not make any airbrake tests or inspections before the switchman go out on duty.

Practically all other railroads come into the C. B. Yard with their own equipment, except the Pennsylvania. Their equipment consists of train crews, own engine crews and their own switching crews. The Illinois Central is the only one that brings a caboose in the C. B. Yards. The Nickel Plate bring one to the Bridge Junction but never in the Yard.

There would be a thirty-minute delay if we had a caboose on westbound movements.

It would be almost impossible to have a caboose on the eastbound movements crossing Merchants or Eads Bridge,

because our tonnage is limited on the eastbound trains and the western roads usually bring in from 75 to 110 loads and [fol. 119] we take what we can handle, and if we would have the caboose we would be in this tunnel which runs from Spruce to Washington Avenue and we would be there in an interlocking plant.

We could have cabooses before we started; that thirty minutes wouldn't have anything to do with it.

We have classification engines at the westbound Yard and the north end of the eastbound Yard twenty-four hours a day. Whether or not these engines at the end of the Yards could pick up cabooses and set them against any train in say from three to ten minutes all depends on where the caboose or train was. We have never had any cabooses in this territory.

We have twenty-two tracks in the west Yard, thirty-nine eastbound and the old Yard adjacent with about eight tracks in it. Every track is off of a lead. Off of the lateral tracks, we have receiving and classifying Yards both in the eastbound and westbound. The classification tracks are run off of the lateral leads. In the westbound we have about twenty-two tracks, there may be twenty-four, of the lateral leads.

Appearances of Harry Booth and Gerson Marks, entered as attorneys for the Commission.

Appearance of Walter N. Davis, general attorney for the Chicago Terminal Railroad Association of St. Louis, in lieu of Mr. J. L. Howell, deceased.

Objection by Mr. Campbell with reference to Mr. R. B. Thomas being called as a witness for the Commission.

[fol. 120] R. B. Thomas, witness on behalf of the Commission, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marks:

My name is R. B. Thomas. I reside in Springfield, Illinois. I am employed as Chief Railroad Inspector by the Illinois Commerce Commission, and have been so employed for six years. I am a high school graduate, and graduated from the Michigan College of Mines with degree of Bachelor

of Arts and Engineer of Mines. I have had about eight years' experience with railroads, that is railroad construction, and three years in highway construction, also about six years with the Illinois Commerce Commission. In my present capacity, I have had occasion to make investigations and take photographs, make reports and present evidence before the Commission, and have had occasion to observe and make studies with reference to switching operations and transfer runs. I am familiar with the preparation and interpretation of blue-prints and plans.

I have prepared approximately 1,000 plans, and many thousands of blue-prints. I have taken thousands of photographs and have interpreted them.

I have taken photographs in connection with my investigation in this case. I used a Contesta Nagel Camera, with a four by five opening, Compur shutter. I have had occasion to prepare estimates of cost of railroad facilities.

The word "estimate" is defined as a calculation of the approximate parts of any matter forming cost, which are [fol. 121] based on the facts before you, and is in reality an opinion figuratively shown.

I was assigned to make this investigation definitely on January 5, 1939, by the Commission as a whole.

I have made investigations which caused capital expenditures.

My report covers the period from December, 1938, on through to March, 1939.

Said report was marked for identification as Commission's Exhibit No. 1.

Objection by Mr. Campbell to the witness testifying with reference to said Exhibit No. 1 for the reason that there is no authority in the statute for the preparation or introduction in a case of this kind of such a report. He is an officer of the Commission, and it would be violation of the due process clause of the Federal and State Constitution.

Mr. Daley: He may answer.

A. The first page of this report shows there are three Yards maintained and operated by the Terminal Railroad Association of Illinois and is confined to the activities of one of these Yards, namely, the Central District Yard, commonly known as the C. D. Yard, and limits the report to cover operations only within the State of Illinois.

The report continues on with a description, briefly, of the C. D. Yard. It shows the manner in which the various Yards that have interchange or transfer service with the C. D. Yard are served.

It continues with a narrative of the result of the events [fol. 122] that arose during the riding of the particular runs. It shows a table of the running time between C. D. Yard and the different trunk line Yards as posted in Cabin 1 in C. D. Yard. It continues with an analysis of the time taken for delivery, the lapsed time between certain deliveries arrived in the Yard until the first car or group of cars departed.

It further continues with a log of certain runs that were made with the use of Shelter Cab No. 545. It sets out the delays that were noted—that is, total cab delays noted by timing in foreign Yards.

It treats with clearances, description of shelter cab, and flagging equipment as noted, and the position of the rear brakeman or switchman. It treats with the questions of safety and comfort.

There is an outline of distances traveled between Yards, and is concluded with an estimate of cost of handling cabs on certain transfer runs operating out of C. D. Yard.

Attached are five appendices, blue-prints, log, group of photographs, etc.

Objection by Mr. Campbell to admission of Commission's Exhibit No. 1 for reasons heretofore stated.

Mr. Daley: Commission's Exhibit No. 1 may be admitted, subject to the objection.

Whereupon, said Commission's Exhibit No. 1 was admitted in evidence (Rec. pp. 1056-1086).

Cross-examination.

By Mr. Campbell:

I spent considerable time in the various cases in which I was assigned to make an investigation, in riding the trains [fol. 123] and making investigations in connection with switching operations. When I worked for the Illinois Central Railroad in construction work, I was around switching operations and threw switches and switched cars. I had considerable experience in the switching of cars and throw-

ing switches in Yards, moving materials, but I was never employed in train service.

I made observations as to movements between C. D. Yard and the Pennsylvania Yard and the Illinois Central Yard and the Mobile Yard and the Southern Railroad Company Yard at Coapman, also the Louisville & Nashville Yard and the Big Four Yard, and the Wabash Yard, and all those Yards in the area of Bridge Junction, but they were not included in this report.

I spent about between ten and fifteen days in the Yards in making this investigation. I had assistance in making this report from Mr. H. L. Butler.

I would say that about 200 round trips were made from C. D. Yard to the Pennsylvania, by the Pennsylvania Road in one month, based upon my observation during the week of January 8th to 14th.

I would say about ninety-two trips were made between the C. D. Yards and the M. & O. Yards, in one month, based upon my observation during the week of January 8th to 14th.

About 180 round trips were made between the C. D. Yards and the I. C. Yards in one month based upon the same observation period.

About 83 round trips were made between the C. D. Yards [fol. 124] and the Southern Yards in one month based upon the same observation period.

I have made certain estimates that for these four runs six cabooses or shelter cabs, if they are used, would be sufficient for cabooses to be handled on all of these four runs, based only on what I observed during my test and what the result of the test has projected into a year's showing.

The switching crew consists of an engineer, a fireman, a switchman, a foreman, and two other helpers. That is the standard in these Yards. I have computed the wages of the crew at $35.82 an hour for an eight-hour period, and I have reduced that down to approximately 7½ cents per minute. That would be about $4.47 or $4.50 an hour. For overtime it would be a little over 11 cents, that would be about $6.65 an hour. That is overtime.

When I worked for the Illinois Central Railroad Company a switch engine was charged at $75.00 a day of eight hours. That is including the crew. That was from 1921 to

1930. That is the price charged to the contractor for switching service. It was carried in the contract. Whenever the contractor desired the services of a switch engine for a day, I made a charge of $75.00 against his credit.

The report shows that the running time between the C. D. Yard and the Pennsylvania Yard with the train to be eleven minutes.

Upon some occasions there were two men who rode the caboose. There was a conductor or foreman or a rear man. In some instances I rode the run to the Pennsylvania on [fol. 125] January 17, 1939. I know the schedule time shown by the time card for departure of the BL 2 and BL 8, and I observed the time they left, and I saw them leave the yard. To that extent is all I know about it.

I rode one run that was a rush run to make connections with the fast train BL 8. That run left C. D. Yard where the engine coupled up to C. D. Yard at 10:41 o'clock in the morning. As I recall that was two cars of mules and horses for some point around Sharon, Pennsylvania. We used the runner track of the C. D. Yard to the Pennsylvania Yard, cut off the caboose on the runner track and set the two cars in the train with the Terminal engine. There were two cars and the caboose.

My estimate is based on three runs. The only runs I observed where there was a caboose on the train were the two mentioned. Mr. Butler observed the third. The others I observed had no cabooses.

Relative to perishable freight and freight that has to be moved, I know there are certain connections that have to be made, and you have to be within the limits of those Yards at a certain specified time before the departure of the train, and also those limits can be extended by telephone calls. My understanding is that it can be extended, when the call is made before the arrival, some fifteen minutes, on the Pennsylvania.

The whole report is based on actual crew wages plus the initial cost of the cabooses.

My report shows that the Terminal Railroad Association handles approximately 65,000 on the entire system, for one week.

[fol. 126] I do not have the figures as to the number of cars handled during that week of my observation or any other time between the C. D. Yards and the Pennsylvania or between the C. D. and any of these other Yards.

Cross-examination.

By Mr. Schwarzbach:

Caboose handling time is all of the time consumed in the handling of the caboose. That is to say an engine picks up a caboose, runs around the train, couples the caboose on the train, returns and couples to the head end of the train. If it took eleven minutes to make that move, that would be handling time.

Delay time is the difference between the handling time and other delays that occur during the same period of time. It is explained that during the eleven minutes required to run around the train and return to the head end that the air man had been called in by that time and he started working, coupled the air, and three minutes after the move was started, and continued on until the engine had returned and recoupled to the head end of the train, and there would be—eight minutes of that handling time would be a result of or could be charged to another delay which is not incidental to the handling of the caboose. That is the difference.

In computing the figures in the report I used handling time. That is greater than the delay time. I used the handling time in the estimate of the crew's wages. In making my investigation I used only one shelter cab or caboose. We had the use of a new shelter cab, No. 545, which was given to us by the Terminal in making the run.

[fol. 127] If more than one caboose were used regularly, it would all depend on the manner in which the cabooses were arranged to reduce the actual handling time. That is, if the six cabooses were placed in C. D. Yard and assigned to one particular track, and if arrangements could be made with the Pennsylvania to handle the spare caboose of the Terminal in their Yard, there could be a reduction of the handling time both in the C. D. Yard and in the Pennsylvania Yard.

Assuming we had six cabs, there would be one assigned to each of the delivery runs, which is four. There would be a spare left in C. D. Yard and a caboose left in the Pennsylvania Yard. That would account for the six cabooses.

When a cut of cars—say we started with the first crew—would go to the Pennsylvania Yard they would take their entire train out. This is starting out, I would say. They could leave there—cut off and leave the caboose on the train,

and when the Pennsylvania Railroad classified that cut of cars they could kick the caboose in on the Terminal track on which they make up their deliveries that are returned to the C. D. Yard. Then the engine, of course, in that instance would go back light. The next time it came it would come with its caboose. This is in instances where they are handling trains in both directions. That is a cut from C. D. to the Pennsylvania and returning from the Pennsylvania with the cut to C. D. They would move up and couple onto the cut, and the caboose would already be on, and they would go on back to the C. D. In the C. D. Yard, if the caboose was on the caboose track and arrangements made for that it would reduce the handling time in C. D. Yard.

[fol. 128] All of the cuts that leave C. D. Yard move out at the south end. I call that south, toward the Reloy Depot. And the lead engine at the north end could kick the caboose on and perhaps reduce that handling time two minutes. Perhaps it would result in the minimum figure as shown on page 19, where we show 126 moves in C. D. Yard in four minutes.

It would eliminate nine moves in the Pennsylvania Yard at seventeen minutes, where the allowance of time showed that it took seventeen minutes to handle the caboose.

In my report I recommend six cabooses for the crew working out of C. D. Yard.

On the 126 moves, it will resolve back to the minimum time of four minutes each.

Objection by Mr. Campbell. Objection overruled.

That would show a reduction in the handling time of the cabs in the C. D. Yard of 252 minutes per week.

Referring to that Pennsylvania run where I have nine and seventeen that would then eliminate 153 minutes of time.

The Mobile & Ohio, the Southern and the Illinois Central make deliveries to the C. D. Yard; these lines use cabooses, in making deliveries to the C. D. Yard. There are no cabooses used or employed by the Terminal crews working out of the C. D. Yard.

I observed that the crews on two other runs in the yard used torpedoes, flags, red lanterns.

If the actual handling time of the cabs was reduced the [fol. 129] actual amount of crew wages would be reduced in proportion. It would be reduced from what it actually was, but would still lie within the limits between the mini-

mum and the maximum. The estimated time involved in handling cabs during that week would be 1,332 minutes. In the use of six cabs regularly that 1,332 would be cut 152 minutes. That would involve backing down to the neighborhood of the minimum which we have shown there to take care of that fluctuation.

If we have the use of the six cabs instead of the one used that would show a saving of about 405 minutes, or roughly one-third of the actual time as shown. The time shown on page 22 of my report as T-$4,828.32, would be reduced approximately one-third.

As to maximum time shown in my report it was an opinion based upon our observation, and gave four or five minutes as the case may be as allowance for a yard or track to be blocked, or to be cleared by another engine that might be using it at that time. It was not based on actual clock time. It was a guess on our part.

The initial cost of six shelter cabs would be $7,402.14. There would be depreciation and maintenance following the first year, but no expense of that nature.

If a run similar to the one shown on page 12, at the top of the page, that was a run made by the two cars to the Pennsylvania. It was considered as hot stuff. The runner track was used, and the caboose pulled up just to the clear of the switch leading into the track on which BL 8 was standing and being made up for departure east. If there had been five or ten or fifteen cars in that cut it would [fol. 139] not have made any particular difference. They would have to pull up and clear the switch to open it and move in and take the cars. Whether one or a dozen or fifteen it would not make much difference.

Further cross-examination.

By Mr. Campbell:

On one trip to the Pennsylvania, a yellow flag was given the rear man and was displayed on the caboose. At night a white and red light in switching movements is used by the Terminal crews. I did not see any torpedoes.

As a general rule there are no transfer moves made back and forth between C. D. Yard and the Pennsylvania. So far as I know there are transfer moves made by the Southern, the M. & O. and the I. C. from their yards to the C. D. Yard.

The Illinois Central, the M. & O. and the Southern had a caboose with them on these runs.

As to this proposed reduction of two minutes, to get that you would have to have the lead engine customarily used in making up other trains. The engine handling the train would not touch it. It would take approximately four minutes.

There would be four engines running all day long for the twenty-four hours making transfer moves.

Mr. Campbell asked to have two witnesses sworn in to testify in regard to the matters covered by this report, and asked that the record show that rebuttal testimony on both sides of this report be postponed until the full report is in, with the understanding that the respondent withdraws its offer for the presentation of the two witnesses.

July 5, 1939. Brief of Terminal Railroad Association of [fol. 131] St. Louis on question of Jurisdiction filed.

July 15, 1939. Answer of complainant to Brief filed by respondent on question of jurisdiction.

August 4, 1939. Reply of respondent to Brief filed by complainant.

R. B. Thomas, witness previously sworn and examined on behalf of the Commission, resumed the stand for further direct examination by Mr. Marks, testified as follows:

(Objection by Campbell as heretofore made with reference to this witness.)

I am the same Mr. Thomas who testified previously in this proceeding.

I have continued the original investigation to cover Madison Yard and Wiggins No. 2 Yard, and the runs originating in those Yards and moving to points within Illinois.

I have made a continuation of my first report covering the same subject-matter at different locations.

Whereupon said report was offered in evidence and marked Commission's Exhibit No. 2.

My first report contained two unnumbered pages, and pages 1 to 22, inclusive. Commission's Exhibit No. 2 continues consecutively with the first report, pages 23 to 33, inclusive.

The report is based on a field investigation made in Wiggins No. 2 Yard and Madison Yard, in substantially the same manner at the first report, which covered C. D. Yard.

It shows: On page 25, distances between Yards. On page 26, the various deliveries outbound from Madison Yard [fol. 132] by the Terminal during the week of May 14 to May 20. Those are actually deliveries as taken from the record of the Terminal Railroad Company. The same holds true on page 27 with reference to the various runs outbound from Wiggins Yard.

Page 28 is the computation for the estimate of the caboose handling time for the cabooses during the week of May 14 to May 20. That is the time that was developed in the tests that were made in the field and applied to the actual runs that were made during that week of May 14 to May 20.

In a similar manner, page 30 shows the estimated handling time for cabooses at Wiggins No. 2 Yard.

Page 31 is a computation for the estimate of annual caboose handling time at Madison Yard and Wiggins No. 2 Yard.

Page 32 lists the number of cars that were handled by months by the Terminal Railroad during 1938, and is the same figure that was used in the first report for the development of the volume factor. It lists at the top and right of the sheet the cars handled by the Terminal during the week of May 14 to May 20, 1939, on the System, and that figure is involved in the deduction of the volume factor. At the bottom of the page there is a development of the overtime factor, and the combined factor as a result of multiplying the volume factor and the overtime factor together.

Page 33 shows the estimated annual crew wages for handling cabooses at Madison Yard and Wiggins No. 2 Yard.

[fol. 133] Cross-examination.

By Mr. Campbell:

All measurements mentioned on page 25 of the report are taken from the center of Madison Yard to the center of C. D. Yard.

In the first column the runs that were made from Madison Yard to C. D. Yard on the 14th, and the figure 6 is immediately opposite the date, the 14th. For example, May 14, National Stock Yards, 1.

I might add to clarify this particular table that these runs are taken from the record of the Terminal. They do not purport to be examinations or tests.

The information contained on page 28 was arrived at in the following manner: First, the first column under "Moves," where appears the figure 165, that compares with the figure as shown on page 26. That is the actual number of round trip moves that were made during that week.

With reference to the estimate made of the minimum of five minutes and the maximum, for example the C. D. Yard, the 54 moves, a caboose was on a northbound move in a C. D. Yard, and was at the south end of the Yard, and it was desired to place a caboose on that train. That train could pull south through Madison Yard and double to the caboose, which takes approximately four minutes by test. That is the minimum. The minimum time at the C. D. Yard to transfer the caboose would be four minutes. The minimum time would be four minutes in Madison Yard and four minutes in C. D. Yard.

I arrived at this minimum by tests that we made in those Yards.

[fol. 134] The actual was six minutes in that particular allowed for the average move. From one to three movements were timed in each of the Yards, except Madison Yard. We were working in Madison Yard, and of course the runs that originated in Madison Yard and going to all the other destinations, we would make a test on it as it left the Yard, which would make the test much higher in number in Madison Yard. The number of tests made in Madison Yard would add up to all the tests made in the other Yards.

My opinion is that the time that will be required for the handling of cabooses will compare favorably with the actual time as set forth in the estimate. Now, the minimum time would be where every condition would be favorable and there would be no slip-up in the handling of the cabooses. In the maximum time, all of the cabooses would have to be handled in a roundabout way. My opinion is based on the tests that I made.

Cross-examination.

By Mr. Schwarzbach:

Wiggins Yard No. 2 and Madison Yard are both confined entirely within the State of Illinois, and my investigation was confined strictly and entirely within the State of Illinois.

We had the use of one caboose or shelter cab a day. This report really covers actual tests, riding cabooses and shelter cabs upon numerous occasions.

In arriving at the cost of a particular operation in railroad terms, it is usually considered that it should be shown by operating expense, the cost should be shown by [fol. 135] operating expense. I have endeavored to show here and have made an estimate of what the charge of operating expense would be for the cabooses. The operating expense that would be applied at two and one-quarter times the crew wage does not necessarily mean that all of that operating expense is necessarily an added expense. It is reasonable, in my opinion, to assume another president would not be required, nor another Yard Master, an additional Yard Master, and additional interlocking man, and the services of those men are included already in operating expense.

There is additional coal and water and oil that is required for the movement of the caboose. There is the maintenance of the caboose which is also an operating expense. That is additional expense and is covered by operating expense. But approximately two and one-quarter times the crew wages simply means that there would be a paper shift or a record shift of the allocation of various costs that are used in making up operating expense, and assigned to the operation of the cabooses.

That is how I arrived at that, a comparison between the crew wages, which are set forth in operating expense in the annual report as two separate items, the salary of enginemen and fireman as one item, as I recall, and the other item is Yard conductors and switchmen. The ratio between the total operating expense and the crew wages on this particular railroad is 2.65. That is to say for each $1.00 of crew wages also there is a charge of $165.00 for operating expenses.

So far as I know those reports are filed with the Illinois Commerce Commission each year. I took this from the [fol. 136] last report filed for the year 1938.

Commission's Exhibit No. 2 was admitted in evidence. Same objection by Mr. Campbell as to Exhibit No. 1. Exhibit No. 2 was admitted subject to the objection (Rec. pp. 1087-1097).

Direct examination.

By Mr. Marks:

Mr. Campbell: The Commission has called Mr. Thomas as a witness. The respondent makes the same objection, which I understand is satisfactory without repeating it. And furthermore, as I understand Mr. Thomas' testimony today, it will be in reference to an exhibit that will be marked Commission's Exhibit 3 involving only runs over the bridge from Illinois to Missouri and back again.

Mr. Marks: Except that he will only testify as to those operations which are in the State of Illinois, because he did not leave the State of Illinois.

Commission's Exhibit 3 is a continuation of the other two sections of the report of an investigation made by Mr. Thomas.

This third investigation covers operations on the Terminal Railroad Association of St. Louis within the confines of the State of Illinois, inbound and outbound movements from C. D. Yard on Eads Bridge, and movements from Wiggins Yard and Madison Yard, inbound and outbound, by way of Merchants Bri-ge, in Illinois.

The investigation extended from Eads Bridge to a point 292 feet west of the east shore line of the Mississippi River. And on the Merchants Bridge the investigation extended to [fol. 137] a point approximately 528 feet west of the east shore line of the Mississippi River.

The third section of the report was compiled in the same manner as the preceding two sections.

Pages 34 and 35 set forth the scope of the investigation, the Yards in which investigation was conducted, the bridges, and shows the location of Merchants Bridge as scaled; sets forth that cabooses are furnished on transfers operated out of Wiggins No. 2 Yard from October 15 to May 1; indicates that clearances were measured and diagrams developed which will be found later in the report, as well as photographs made which also appear later in the report.

Page 36 discloses the scale distance from center of C. D. Yard to the Illinois line on the Eads Bridge, and from the centers of Madison Yard and Wiggins No. 2 Yard to the Illinois line on the Merchants Bridge.

Pages 37 and 38 set forth certain equipment that was observed during the investigation; they set forth the detail

and the direction it was moving, the date, the time, the engine that handled the equipment, car numbers and initials, and height and width of that particular equipment.

Pages 39 and 40 are photographs showing physical structures and surroundings on Eads Bridge in Illinois. Also are shown transfer moves, and the possible location, and manner in which the switchmen ride those runs.

Pages 41 and 42 are views on the Merchants Bridge in Illinois, showing transfer movements on that bridge.

Pages 43 to 49 inclusive are diagrams showing clearances [fol. 138] as measured during the investigation on both Eads Bridge and Merchants Bridge in Illinois.

Page 50 sets forth the number of runs as taken from the records of the Terminal operated out of the C. D. Yard, Madison and Wiggins No. 2 Yard, moved over the respective bridges, Eads Bridge and Merchants Bridge.

Page 51 is a computation in which the number of minutes was developed for the handling of a caboose in connection with the runs as set forth on page 50.

Pages 52 and 53 contain a further development of the handling time, and reduced to dollars and cents. Also, at the bottom of page 53 is a paragraph with reference to the operation of cabooses.

Page 54 is a summary of the number of cabooses covered by the report, and also the amount of crew wages as set forth by the report for actual crew handling time.

Cross-examination.

By Mr. Campbell:

My investigation only covered the matter of the C. D., Wiggins No. 2 and Madison Yards to approximately the middle of the river. I was not in Missouri on my investigation.

All these runs over these two bridges either come from the State of Missouri to Illinois or go from the State of Illinois to the State of Missouri.

Objection by Mr. Schwarzbach to any testimony with reference to Missouri.

As I understand, when there is work for more than one run out of Wiggins No. 2, a crew from Missouri comes [fol. 139] over and does the work. As to furnishing a

caboose for that crew, I am not in a position to say. I don't know. But on this particular run which originates in Illinois and moves over Merchants Bridge, originating in Wiggins Yard No. 2, and moving over Eads Bridge, the crew is furnished with a caboose from October 15 to May 1 of each year.

As a practical proposition to put cabooses on those runs across the river would require them to be hauled on over to St. Louis on runs from Illinois, and put on the train on the runs in Missouri to bring them into Illinois, from the observation I made on the bridge, as I did not see any places cabooses could be set out in Illinois.

Objection by Mr. Schwarzbach regarding what is practical so far as Missouri is concerned.

I mean on the bridge in Illinois.

If a caboose was taken to the middle of the river on either of these bridges, either westbound or eastbound, as a practical railroading proposition it would be necessary to take them on to the other side of the river.

Objection by Mr. Schwarzbach.

The measurements on the report were scaled from the Terminal's map, and they are from the center of the respective Yards to the middle of the river. We got the dimensions of the cars from the Official Railroad Equipment Register.

On page 50 of my report is shown the number of runs. For example, September 10, Eads Bridge, C. D. Yard, nineteen runs.

With reference to the estimates of the minimum and actual and maximum time required shown on page 51 of my [fol. 140] report, in C. D. Yard, during the previous investigation in Section 1, we made several checks as to handling time in that Yard. From the observations we made during this investigation I could see no difference in the manner in which the caboose would be handled other than in the maximum time. That was in transferring a caboose for maximum time between the inbound Yard and the outbound westbound Yard. We were actually operating a caboose to determine the maximum time of twelve minutes.

We made a movement with a caboose in C. D. Yard in Illinois. It was not attached to any train that came from

St. Louis. It was picked up in the Yard. We went through the movement with a caboose as if it were attached to one of those trains, and transferred from one Yard to the other. That is to the outbound westbound Yard from the westbound receiving Yard. That is the way I arrived at the estimate of the time involved in handling the cabooses in Illinois.

The same explanation given before would apply to the computation on page 52, with reference to applying the wage scale to the minimum and maximum time to the amount.

Page 54 of my report shows that it would require thirty-six additional cabooses in order to cover these runs covered by this report. The computation of $27,777.22 at the bottom of the page represents only as applying to all runs the actual time taken by reason of my investigation for crew wages alone. It does not include any overhead or any other items of expense.

[fol. 141] Cross-examination.

By Mr. Schwarzbach:

There are no crossovers that I observed from one track to another on the Merchants Bridge in Illinois. There are perhaps two crossovers on the approach to Eads Bridge in Illinois.

The reports marked Commission's Exhibits 1, 2 and 3 and the investigation and survey in connection therewith, and my testimony herein, are all confined strictly to the State of Illinois.

On page 39 of my report, Photograph No. 2, the man is standing on top of a drawbar, and has ahold of the ladder or brake staff of the car. There is a hazard in standing there.

Objection by Mr. Campbell.

I refer to Appendix 5 of Report No. 1, where there is a detail of a drawbar and the footing and the hand-holds, and the position in which the man has to stand when riding in such a position. The method in which he has to secure himself is not very good, and the footing that he has is not safe.

Objection by Mr. Campbell on the ground that the witness is not qualified and it would be merely a conclusion of the witness.

Mr. Daley: Let the answer stand.

The Witness: These hazards or dangers could be eliminated by providing a caboose for the man to ride in.

A vertical clearance is the clear opening between the top of rail and the physical obstruction above the rail.

The lateral or horizontal clearance, which are one and [fol. 142] the same thing, is the distance from the center of the track on each side to the fixed obstruction, whether it be a telephone pole, a building, a brace or guywire, or whatever the fixed obstruction may be. That is known as the lateral clearance and the vertical clearance.

For the purpose of explanation, I believe I will discuss the Eads Bridge and then take up the Merchants Bridge, so it will not be confusing.

With reference to Eads Bridge, we can refer to page 43 which is a diagram showing various sections of the Eads Bridge, and showing certain points at which the diagrams change. It shows the extent of the investigation from the shore line on the Illinois side to the west, which is 292 feet, and shows that the center of the river or the Illinois line is approximately 750 feet. That is the center of the river, or the Illinois line. And it shows an examination was made over a distance of 830 feet to the east of the Illinois shore line of the river.

Page 44 is a diagram that was developed from the measurements that were taken during the course of the investigation. It shows the horizontal clearances or lateral clearances at Point No. 1, which is 830 feet east of the Illinois shore line. It shows that the lateral clearance to the north is 6 feet 8 inches, the center of the track is 13 feet 9 inches, and the horizontal clearance to the south of the south track is 6 feet 8 inches. There are no vertical clearances involved at this point. The 13 feet 9 inches represents the distance that the centers of the track are apart. It would be 13 feet 8 inches from the center of the south track to the center of the north track. The 6 feet 8 inches on each side is from the center of the track to the obstructions on the side.

[fol. 143] The location of the diagram on page 44 is at Point No. 1, and can be observed on page 43.

Page 45 is a diagram which was developed from the measured clearances made during the course of the investigation at 63 feet west of Point No. 2. Point No. 2 appears on the diagram on page 43.

It shows that the distances from the center of the south track to the center of the north track is 15 feet and 9¾ inches. It further shows that the lateral clearances from the center line of the north track to the north is 6 feet 5¾ inches. It further shows that the lateral clearances from the center line of the south track to the south is 6 feet 8¼ inches. It also shows that the vertical clearance at that point is 16 feet 3¼ inches over the north track. That also applies over the south track at that point.

Page 46 is a diagram showing a typical section between Points Nos. 5 and 6 as set forth on page 43. And it shows that the distances between the center of the north track and the center of the south track at that location is 24 feet 8 inches, and that the lateral clearances to the north of the center line of the north track are 7 feet 1¼ inches, and to the south of the center line of the north track 7 feet and ¼ inch. And that the vertical clearance is 16 feet 5 inches.

We will refer to page 40 and look at Photograph No. 5. You can observe to the right and to the left of the box car in the foreground the vertical steel members of the bridge. At those locations the tracks are in separate sort of tubes.

Page 47 is a diagram developed from the measurements taking during the course of the investigation, and shows [fol. 144] horizontal and vertical clearance of a section which is typical between Points 7 and 8. Points 7 and 8 are shown on the diagram appearing on 43.

At this point, the vertical clearance is 16 feet 2 inches, and the horizontal clearance to the north of the center line of the north track would be 7 feet and 1¾ inch. And to the south of the center line of the same track it would be 7 feet 1 inch. The same clearance prevails substantially with reference to the south track.

Page 48 is the consolidated minimum clearances of all the diagrams previously explained and show that the minimum clearance from a point 830 feet east of the Illinois shore line of the Mississippi to a point 292 feet west thereof, the horizontal clearances would be north of the center line of the north track 6 feet 5¾ inch-, and south of the center line of the south track would be 7 feet ¼ inch. And the

vertical clearance would be 16 feet 2 inches. Those same horizontal and vertical clearances apply substantially to the south track.

Page 49 is a diagram showing the consolidated minimum clearances as measured from a point at the east shoreline of the Illinois side of the Mississippi River to a point approximately 528 feet to the west. Incidentally, the middle of the Mississippi River at that point, or the line between Illinois and Missouri, is approximately 775 feet west of the east shoreline, the river being at a stage of —2.4, which was the case on the day we made the investigation.

The lateral clearance to the north of the center line of the north track is 6 feef 9 inches, and the distance between [fol. 145] the center line of the north track and the center line of the south track is 12 feet 1 inch. And the lateral clearance between the center line of the south track and the fixed obstruction to the south is 6 feet 8 inches.

Now, taking into consideration the equipment that was observed moving over these bridges during the course of the investigation, I will select the last car, which is 15 feet in height. From the consolidated clearance diagram of the situation shown on Eads Bridge, which appears on page 48, we find the vertical clearance to be 16 feet 2 inches. So the distance between the top of the running board and the fixed obstruction is 1 foot 2 inches.

Taking into consideration the smallest car that was observed at that point, which was 12 feet 10 inches in height, the clear distance between the running board of that car and the fixed obstruction as shown on page 48 is 3 feet 4 inches.

Taking the narrowest car that was observed, which was 10 feet in width, half of the width of the car of course is 5 feet, and it will extend 5 feet each way from the center line of the track. Deducting, then, the 5 feet for half of the width of the car from the distance to the north of the north track, which is 6 feet 5¾ inches, we have 1 foot 5¾ inch clearance between the side of the car and the fixed obstruction.

Taking the widest car observed which was 10 feet 10 inches, that clear distance will be reduced by 5 inches. The clear distance between the side of the car and the fixed obstruction will then be 1 foot ¾ of an inch.

The center of the tracks on Eads Bridge are not involved [fol. 146] in restricted clearances or reduced clearances of any nature.

Taking the 10 foot 10 inch car, and substracting half its width from the clearance south of the center line of the north track, we have a difference of 1 foot 7¼ inch. Those same conditions prevail approximately on the south track.

Now, with reference to the clearance on the Merchants Bridge, it is noted that the centers of the tracks are 12 feet 1 inch. I am referring to page 38. We observed that a car 10 feet 10 inches passed over that bridge. So deducting 10 feet 10 inches, which is the same as deducting half of two cars, each being 10 foot 10 inches, and the trains being on both tracks at the same time, one in one direction and one in the other, that would give us a clearance between the two trains of 1 foot 3 inches.

I might draw your attention to the fact this clear distance does not take into account any sway or rocking of the cars that occurs during the time the cars are in motion, the rocking back and forth. At the time I made the observation there appeared to be approximately 2 inches of sway or rocking of the cars at the rate of speed those trains were being operated.

The clear lateral distance between a car 10 foot 10 inches in width on the north track and the obstruction to the north would be the difference between 5 foot 5 inches and 6 feet 9 inches, and that would be 1 foot 9 inches.

For a car of the same size on the south track, the clear distance between the car and obstructions to the south would be 1 foot 3 inches.

With reference to the vertical clearances, we take a car [fol. 147] 14 feet 11 inches, which appears to be the highest car on that bridge which passed over during the investigation, the clear distance between the top and the fixed obstruction would be 4 feet 10½ inches.

Taking the lowest car observed during that time, which was 14 feet 6 inches, deducting that from the 19 feet 9½ inches, we have 5 feet 3½ inch clear distance between the top of the car and the fixed obstruction overhead.

In my opinion these clearances are inadequate and insufficient to guard the safety of the switchmen operating over these tracks on the Illinois side.

Objection by Mr. Campbell, for the reason that it is the ultimate question for the Commission. Objection overruled.

A man could not ride on top of a car with height from the rail to the top of the running board of 14 feet 10 inches unless he was less than 2 foot 2 inches tall.

Objection by Mr. Campbell.

For a man to stand on top of the smallest car, 14 feet 6 inches from the rail to the top of the running board, he would have to be less than 5 feet 3½ inches tall.

Objection by Mr. Campbell.

Where the extreme width of a car is 10 feet 10 inches a man could not ride in safety on the side of the car, on either side if the train was moving. There would be some rock in the car, and if there were 10 feet 10 inch cars on both tracks, the clear distance is 1 foot 3 inches. If you allow 2 inches for rock, there would be a deduction of 4 inches, which [fol. 148] would leave 9 inches clearance between the cars when they were on both tracks at the same time.

It is my opinion that fifteen additional cabooses should be provided by the respondent.

Mr. Campbell: Motion to strike that answer upon the ground that is expressing an opinion upon the ultimate question of facts.

Q. Upon what do you base that answer of the fifteen additional cabooses providing necessary facilities?

A. That was based upon the study of the number of runs.

Mr. Daley: I will reserve ruling on the motion.

The Witness: The same reasons would apply to Reports Nos. 1 and 2 the same as I just gave.

Objection by Mr. Campbell. Objection overruled.

Motion to strike by Mr. Campbell for the same reason. Objection reserved.

With reference to my report wherein I mention it would be feasible to assign cabooses to certain runs while in other instances pooling of cabooses would be more practical, that would be where more than one crew used the same caboose during an eight-hour period or a twenty-four hour period. For instance, a caboose would come in on a transfer from

the Eads Bridge into C. D. Yard. And it may be about that same time the transfer was ready to go to the Pennsylvania. The caboose that came in off of the run over the Eads Bridge to the C. D. would be placed on the run that went to the Pennsylvania.

The operation of the caboose is a matter that should be left to the management of the railroad.

[fol. 149] Further cross-examination.

By Mr. Campbell:

There are no crossovers west of the Illinois shore line and a point 292 feet west thereof on the Eads Bridge between the two tracks. As to whether there are any between the point 292 feet west of the shore and the middle of the river I do not know.

Mr. Campbell: What I want to do is to save the point to all of Mr. Thomas' testimony, on all three of the reports. To move to strike it all for the reasons heretofore assigned, and the objections to it.

Mr. Daley: I will reserve ruling on that.

Mr. Marks: At this point I recall I have not yet asked that the third section of the report be admitted. I will ask now that the third section of the report, marked Commission's Exhibit No. 3 be admitted in evidence (Rec. pp. 1098-1118).

Mr. Campbell: We object. Same objection.

Mr. Daley: And ruling is reserved.

Mr. Campbell: Now I renew my motion to strike all of Mr. Thomas' testimony for the reasons heretofore assigned.

Mr. Daley: And that ruling is reserved.

John A. Wicks, witness on behalf of respondent, having been previously sworn, testified as follows:

Further direct examination.

By Mr. Campbell:

Respondent's Exhibit No. 36 (Rec. pp. 1171-80) shows the movement into and out of C. D., Madison and Wiggins [fol. 150] No. 2 Yards. That is the actual movement for

the twenty-hour period commencing 12:01 A. M. on October 27, 1939.

Objection by Mr. Schwarzbach for the reason that the witness hasn't laid the proper foundation to testify to the substance matter contained in this Exhibit No. 36. Objection overruled.

The actual detail figures were supplied by clerks in charge in these three Yards, forwarded to me and consolidated into one statement.

Cabin No. 1 Crews means the designation in C. D. Yard Districts. Cabin No. 1 is located in one part of the Yard from which the crews making these deliveries depart.

Foreman is the train foreman in charge of the men.

Objection by Mr. Schwarzbach with reference to the time movements shown in the Exhibit from St. Louis to Illinois. Objection overruled.

Mr. Schwarzbach: That other objection I made, that proper foundation has not been laid by any testimony by Mr. Wicks.

Mr. Daley: Let that be understood.

The Witness: The heading "Eads Bridge Freight Crews" is shown simply as a matter of information, in order that the statement may reflect the true picture. I have every figure contained in the statement for arrival time at C. D. Yard in the State of Illinois. There are no figures from Missouri in the statement. "Time arrived" means the arrival at C. D. Yard in East St. Louis, Illinois.

[fol. 151] No time of leaving St. Louis is given or pretended to be given.

Page 3 is a statement of the same Eads Bridge crews, the runs, showing the departure time from C. D. Yards, East St. Louis. It is similar information as to foreman, engine numbers, and so forth, for movements over Eads Bridge.

The destination is a matter of information, showing where the crews terminated.

That is in St. Louis. The time of arrival and departure are from C. D. Yard, East St. Louis.

Objection by Mr. Schwarzbach to all the testimony of this witness.

All the information on the page headed "C. D. delivery crews, C. D. lead crews, Eads Bridge Freight Crews and

Wiggins Ferry crews" concerns movements in the State of Illinois.

As Chief Clerk to the General Manager I have charge of the records in that office. This Exhibit No. 36 was compiled from official records furnished me by the Yard Clerks of the various Yards covering this period.

Document marked Respondent's Exhibit No. 37 was shown to the witness.

That is a statement showing also deliveries out of C. D. Yard, the detailed figures of which are included in the previous exhibit. That simply shows what we term the heaviest connections, the lines to which most deliveries are made from C. D. Yard, East St. Louis. Those deliveries all terminate to lines in the State of Illinois.

Same objection as heretofore made to this exhibit, by Mr. Schwarzbach.

Exhibit No. 37 is a statement showing the intensity of [fol. 152] movement from this same C. D. Yard District, in which Yard is located the icehouse which naturally makes that Yard a concentration point for perishable traffic going to these east side connections. These four lines are picked out because they are the lines to whom we make the most deliveries and make them more frequently than to other lines, due principally to the fact they handle the majority of perishable business out of East St. Louis.

These four lines are very important trunk lines to the east.

The first page of Respondent's Exhibit No. 38 shows the service buildings and other structures located in the C. D., Madison and Wiggins Yards, for the protection of the health, safety and comfort of switching forces.

Objection by Mr. Schwarzbach. Objection overruled.

The second page shows service buildings and other structures that are available for use by switching crews located along the lines they follow making the deliveries to the C. D. Yard and other Yards from the various connections.

Each service building or other structures shows in connection with each one just what equipment is provided for the benefit of the switching force.

The service building located in the north end of the Madison Yard is equipped with showers, washstands, toilets, lockers, steam heat, electric lights and drinking water.

The same thing would apply to the others except as to different equipment and the location in the Yards or places specified.

Objection by Mr. Schwarzbach that it is all immaterial. Objection noted.

[fol. 153] I know of those locations in a general way. I have been in practically every one of them.

Whereupon, Respondent's Exhibit 36 (Rec. pp. 1171-1180), 37 (Rec. pp. 1181-2) and 38 (Rec. p. 1183) as of December 6, 1939 were admitted in evidence.

Same objection by Mr. Schwarzbach.

Cross-examination.

By Mr. Schwarzbach:

I did not ride any of the runs mentioned. I had everything to do with the assembling of the figures in my office. I assembled the data sent to me by the man who made the check on the actual movements in the Yard.

With reference to the item third from the bottom on page 4 of Exhibit 36, it would appear the time mentioned was a typographical error.

With reference to the fifth item from the top on page 10 of Exhibit 36, it shows departure at 8:20 o'clock A. M., Yard No. 5, and the destination is Monsanto Chemical. 6:25 o'clock P. M. was meant. It shows he took about ten hours and forty-five minutes to make that run.

The switchmen are permitted to stop and use the facilities mentioned on the second page of Exhibit No. 38 at C. P. Junction, if they have occasion to.

Cross-examination.

By Mr. Marks:

The time mentioned represents the time left C. D. Yard and the time returned to C. D. I do not know whether that particular run out was light or with a cut, or the run back was light, or with a cut. Sometimes they are light or sometimes with cuts. Most of the time with cuts.

[fol. 154] Redirect examination.

By Mr. Campbell:

On page 4 of Exhibit No. 36, the third from the bottom, on the face of it, it appears to be a typographical error.

You cannot get back before you start, very well. The error was made in compiling the original sheets.

The Monsanto Chemical Company is a large industry on our rails to which an engine is assigned to that company and industries in the vicinity for the entire tour of duty. The time shown is the time the crew left the Yard to go to work, and the time they finished the work and returned to the Yard.

IRA DAVIS, witness previously sworn on behalf of the respondent, testified as follows:

Further direct examination.

By Mr. Campbell:

As Superintendent I am in charge of operations on both sides of the river.

I am familiar with the East Side Yards of the Terminal. I have switched over them when a switchman. I was a Yard Master of the East St. Louis Yards.

The icehouse is within the confines of C. D. Yards. It is, I would judge about 1,000 feet north of the Eastbound Classification Yards.

The switching crews work on three eight-hour shifts. They must go to work between 2:30 o'clock P. M. and 4:00 o'clock P. M., between 10:30 o'clock P. M. and 12:00 o'clock Midnight, and between 6:30 o'clock A. M. and 8:00 o'clock A. M. They have twenty minutes off for lunch period.

They quit work at the place they start in, the designated place.

[fol.155] There is the seat box on the engines, a large seat box behind the seat of the engineer to put their rain clothes in.

A caboose would be available to the rear men. The time and opportunity of the rear men to use the same would depend upon the amount of deliveries he made and the length of the deliveries. The switchmen make up the cuts that they haul from one Yard to another.

The caboose would not be available for the rear man while that work was being done. The only time he would ride the caboose would be between one Yard and another.

Riding on drawbars is permitted only on Eads Bridge. It is permitted on Eads Bridge because of clearances on Eads Bridge.

With reference to Commission's Exhibit No. 1, page 11, regarding the first test run made by Mr. Thomas, a delivery from C. D. Yards to the Illinois Central and return on January 17, 1939, which test shows a delay of two minutes for the caboose, if there wasn't advance notice given and everybody lined up to do a specific move, if it was a regular and ordinary move, it would take from thirty to forty minutes to get the caboose and put it on the train, get the caboose on the return trip from the I. C., bring it back to the C. D. and put it away. In my opinion there would be an average delay of between thirty and forty minutes.

There would have to be a designated track set forth for the storing of these cabooses. There would have to be a caboose track.

With reference to delivery with a caboose from C. D. Yards to the Pennsylvania Yards, the delay in our Yard [fol. 156] would be approximately the same as it would be on the Illinois Central delivery.

In my judgment the caboose delay would be at least thirty minutes.

Objection by Mr. Schwarzbach. No proper foundation for the witness to testify.

Mr. Daley: The question has been answered.

Mr. Schwarzbach: I ask it be stricken.

The Witness: I spend practically all of my time around the Yards of the Terminal Railroad Association.

In the test runs, advance information was given to everyone concerned. The Yard force, the operating department and so forth. There was an officer of the railroad who rode the run. In other words, it was a show run. It was given preference over everything, where regularly he would have to take his cars, get the caboose when he could, and get out when he could.

With reference to the average time lost on each round-trip run with the use of the caboose, it would vary. On some runs the time would be twenty minutes, and other runs it would be an hour and thirty minutes. From my experience and observation, it would average forty minutes on each delivery, on a complete round-trip.

I can't agree that for the four runs mentioned in Commission's Exhibit 1 that six cabooses would be sufficient. It would take at least eight cabooses, and then if any of them were bad ordered, we would go short. You have got to allow a certain amount of equipment to be on the rip track. Where we go to the Pennsylvania Railroad, we have as high as three engines in the Pennsylvania run at one time.

[fol. 157] A lot of times perishable freight and livestock show up and we do not have advance notice of it, and have to start one crew possibly twenty-five or thirty-five minutes behind another crew to make connections.

The Pennsylvania Railroad runs east from East St. Louis to Indianapolis—practically all large cities in the east.

It goes to New York, Philadelphia and Pittsburg.

The Pennsylvania gets the large percentage of highly perishable freight. They have regular freight trains for the carrying of fast freight to points in the east. They have what they call a cut-off time from one hour and thirty minutes to thirty minutes before departure, all depending upon the class of freight.

I gave my management an estimate of fifty cabooses on all of the runs covered by Commission's Exhibits Nos. 1, 2 and 3.

Objection by Mr. Schwarzbach. Objection overruled.

At this time I have eighteen regular cabooses and sixteen shelter cabs. None of these are needed in Missouri. I have some on runs in Missouri and some on interstate runs.

Objection by Mr. Schwarzbach with reference to anything pertaining to Missouri.

All of the cabooses mentioned, thirty-two altogether are available for intrastate runs in Illinois, with the exception of five.

Cross-examination.

By Mr. Marks:

Each foreman has an engine.

[fol. 158] With reference to the runs shown on Commission's Exhibit No. 1, not counting the L. & N. run, there were six runs, and four engines were used, Nos. 151, 144,

133 and 143. It would take four cabooses to supply those four locomotives. Referring to the first shift, five runs were made, with three engines and five deliveries. Three cabooses would suffice to take care of them under the circumstances on this particular date.

I am confining it to those four runs shown on the exhibit.

In the second shift, he used three engines to make up seven deliveries, not including the L. & N. Three cabooses would be adequate to take care of the runs.

I approximated that there would be a thirty to forty minute delay in C. D. Yard from personal observation. I timed the Pennsylvania in particular into our Yards, and running around with the cabooses putting them on their trains. It was a Pennsylvania caboose I timed not a Terminal caboose.

In computing my estimate of thirty to forty minutes delay I did not take into consideration the fifteen mile per hour speed. I take the fifteen miles per hour in certain place and at other places six miles per hour. The speed wasn't taken into consideration, but it was the exact time of the move.

I considered the time consumed from the time the engine cut off from the train and went to the north or south end of the Yard, whichever move was being made, got the shelter cab, took it back to the yard he was getting a train, dropped it to the train, went to the other end and got on [fol. 159] the train again ready to take his train out in computing that thirty or forty minutes delay.

Taking for example the run on the Pennsylvania from 12:10 o'clock A. M., to 1:45 o'clock A. M. a man would spend about eleven or twelve minutes in a caboose each way.

Assuming that in connection with that run a man would spend around twenty-two minutes in a caboose, leaving seventy-three minutes or an hour and thirteen minutes of the time indicated, if a caboose had been on this run, there would have to be from one hour to one hour and thirty minutes added to it for the caboose, at least in the Pennsylvania Yard. The other time would be in disposing of his train, going into the Yard, getting his caboose on his train and making up his train for the return trip. That man makes up a train for a return trip at the Pennsylvania Road.

At least an hour of that one hour and thirty minutes added to if for the caboose, would be spent in the Pennsylvania Yard. I have not personally observed anything like that without cabooses. I have observed moves on the Pennsylvania that would be direct, as our move would be if we did the same thing.

In basing my estimate I used a move where a delivery was taken from C. D. to Pennsylvania and back to C. D. again. Pulled in their receiving Yard, going back to their running track, then the Willows, picking up the caboose and taking it north to Kings Highway, or about Kings Highway, to The Alton & Southern connection, putting it on the rear end of the train, coming back to the Middle Yard, going on the head end of the train ready to make up [fol. 160] the return movement. That is the regular procedure if there are caboose cars on these runs.

With reference to the distance the engine moved in going to Willow and back that will have to be explained by the Pennsylvania man as I am not familiar with the scale of the map.

Whereupon, Respondent's Exhibit No. 39 was offered by Mr. Campbell and received in evidence (Rec. p. 1185).

In such a movement the train enters from the south into the receiving line. South is down where Willows is. Our train is northbound on a running track. It enters the receiving track about where the avenue, Monroe Avenue appears on the map.

If the train is cut off, the engine is cut off about the middle of the Yard or the north end of the receiving Yard and it proceeds through these cars over to the running track back south to the running track, to possibly the Willows. Maybe there is a crossover here that can be used, but the Pennsylvania will not guaranty that it can be used at all times. His engine will move northwardly then up in this Yard, pick up his caboose, go back south the same route and then proceed north to the Alton and Southern connection which is the extreme end, north end of the Yard.

We have instructions from the Pennsylvania that they will not guaranty us a track in this Yard.

Our reports indicate that a lot of our trains, when you get to this place, have to wait for instructions whether the track is clear or not or waiting to be cleared, but there are [fol. 161] several occasions we have to wait at the inspection pit to get instructions for the track to pull in on.

The caboose delay would be from the time he had this switch at Willow Tower and come back to the caboose and arrive at that place, and that would be the only caboose delay there would be on that trip.

My estimate of one hour delay at Pennsylvania was based on the time the engine was cut off, went back and got the caboose and proceeded northwardly to put it on his train.

It is very seldom that he has a cut to go back.

Cross-examination.

By Mr. Schwarzbach:

It might be possible to draft a caboose in on an open track and double back against it in ten minutes today and tomorrow it might take fifty minutes. That would depend on the condition in your Yard. The more cars the longer it would take to double. The smaller amount the fewer minutes.

The drifting in of a caboose and the doubling back of say forty cars could be done in ten minutes.

My estimate as a whole of the delay attributable to cabooses is forty minutes of every delivery out of every Yard. That includes Madison, Wiggins No. 2, and C. D. Forty minutes from the time the crew is assigned until it gets it back. This is one of the longest deliveries, this and the Missouri Pacific at Dupo. Some can be made in less time than this. In my figures it would average forty minutes on every delivery made with a caboose out of all these Yards. That is for a round trip.

[fol. 162] The delay on a trip to the Illinois Central would not be very great only time lost would be putting the caboose on the C. D. and practically nothing out of the Illinois Central because we very seldom bring anything back, and then if it does it does only out of an industry on our rails and returned back. As far as bringing the Illinois Central train back to our Yard, we don't do that. The caboose delay would be light. It would be ten or fifteen minutes in the Illinois Central. It is exceedingly long.

The ten or fifteen minute delay depends on whether you come back to the Yard. It depends on how many track pulls, when you pull in the Illinois Central. It depends

on how far from the end of the track. It all depends on the delay you meet with going on that lead to get your caboose.

Further direct examination.

By Mr. Campbell:

Whatever engine a crew is on, there is no other foreman or no other crew except the foreman and the crew in charge of the engine at that particular time.

We have different speeds. Six miles an hour is our speed limit within Yards. On running tracks like we have from C. D. to the Willows is 15 miles an hour. On our main lines between Dupo and East St. Louis, after we get out of the Yard, we allow a speed not to exceed 20 miles an hour.

The rear brakeman in switching services has with him a white lantern by night and red flag by day.

We have cabooses between Wiggins and No. 2 and on return trip they bring train into C. D. with Wiggins crew. That is the way the caboose gets into C. D. Yard.

[fol. 163] Mr. F. M. Heinlein, witness on behalf of the respondents, being first duly sworn, testified as follows:

Direct examination.

By Mr. Campbell:

My name is F. M. Heinlein. I reside at 648 North 38th Street, East St. Louis, Illinois. I am employed as Yard Master with the Pennsylvania at Rose Lake, Illinois. All the Yards shown on the map in Respondent's Exhibit 39 are under my jurisdiction. I have been Yard Master for the Pennsylvania at East St. Louis since 1927.

Before that time I was Yard clerk at the Wiggins Ferry in 1914, Vandalia in 1916, Illinois Central 1917 as switchman. In 1918 I was back to train clerk. 1920 I was promoted to Chief Clerk to the General Yard Master and Assistant Train Master, and in August, 1920, I was promoted to Assistant Yard Master. 1927 I was promoted to Yard Master and have been that ever since. I was chief clerk to the general Yard Master for the Pennsylvania at the East St. Louis Yard. The Yards at Rose Lake were originally Vandalia but that road was absorbed by the Pennsylvania.

I work from 7:00 A. M. to 3:00 P. M., and am on duty at

Rose Lake at the Yard office. I get around the Yards. I do not stay in an office.

We get cuts of cars from the C. D. and Merchants Bridge at Madison hauled by Terminal engines. Wiggins No. 2 doesn't have movements to and from Pennsylvania Yards. Movements from the Madison Yards come on a different track, Merchants Bridge, but do not come through the C. D. Yards.

The cuts that are brought in by Terminal engines and [fol. 164] crews from the C. D. Yard enter our Yard at Willows east of Willows Tower, handled by Terminal crews. They are under my jurisdiction while in my Yard. They are required to obey my instructions. The cuts that come from Madison No. 2 over St. Louis Merchants Bridge enter our Yard at the same place. The same situation exists as to those cuts and crews that come from Madison Yards as C. D. Yards, as to jurisdiction and handling, etc.

Whenever we have a delivery for the Terminal crews on arrival they take them back. Daily average would be five to seven trips a day, of cuts that go back through the Terminal Yard.

I do see Terminal cuts come in with Terminal crew and engine.

Referring to Respondent's Exhibit 39 that map fairly represents the situation in the Rose Lake Yards. All the tracks now on that map are there now and one crossover off of our main track.

With reference to the south end of the map, assuming that a cut of forty cars is brought in by the Terminal from the C. D. Yard without any caboose, they start at the Willows, east of the Willows on the westward running track, coming north to the Inspection Pit, the engine is still coupled onto the forty cars, the conductor gets the instructions what track he must pull in on the Inspection Pit, either interchange track that happens to be clear, either 1, 2 or 3. You have three interchange tracks crossing Inspection Pit to the east end of the Yard. Then the engine cuts off, proceeds up to the Yard office for instructions on the interchange lead. If we have cars for this engine he comes on [fol. 165] up the interchange lead to what we term our drill tracks switching lead, crosses from our drill track to our eastward running track, proceeds north on eastward running track to westbound Yard. He heads against his de-

livery whichever track it may be, from No. 4 to No. 9. Then he couples up his delivery, calls for his route, goes back south down the running track.

Assuming that a caboose was attached to it and assuming they were going to take a cut back first, he would have to pull his caboose, if he had one in the clear at the interchange track of the Inspection Pit, cut his caboose off and proceed to the Yard office again. If we had a cut for him to take he would have to come up to get permission to come down the running track to get the caboose from the cut. If we had interchange track he would run possibly eighty car lengths. If he had to use the running track he would come up this way, back running track 126 car lengths to the east end of the Yard; use the crossover and come back down this way which would be approximately forty cars.

With one track he would go down eighty car length- and eighty car lengths back to where he started, and if the other track were opened it would be 126 down and 126 back, plus the addition of amount of cars between the west end of the Yard and the Inspection Pit.

All of that movement would be extra with the caboose that would not be required without one.

Tracks are not always available for him to use due to the fact of numerous numbers of deliveries from the various lines. We have delivery from the Alton and Southern, or [fol. 166] Wiggins Ferry or lower Yard off of repair track. He would have to wait until he could get clear track to go back after the caboose, and long enough to switch a number of cars that occupied that track. Forty cars take thirty minutes to switch.

He takes his caboose up to the running track north. He could take it up to the east end of our westward Yard. He would have to take it down and put it on whatever track his delivery may be on, then go north again over at the east end of our Yard and back on the running track.

All this would be a movement that would be required with a caboose attached that would not be required when there was no caboose attached.

Tracks are not always open for him to do that in the west Yard. He would have to wait until we cleared a track for him. That relay would not occur if he would not have a caboose.

We have what we call our V. L. 2 run out at 2:00 in the morning, V. L. 6 at 3:30 in the morning, V. L. 8 at 11:00

A. M. in the morning, P. H. 10 at 7:30 P. M., destined for New York, are through trains, fast schedules, carrying perishable freight and livestock. At the present writing the general average shipments would be around sixty or seventy perishables and about twenty to twenty-five carloads of stock. We carry about seventy-five cars on each one of the preferred runs, that would be approximately an average of one-fourth livestock to perishable.

We do have a deadline for perishable shipments and livestock shipments on these preferred runs. We do get Terminal cars that approach the deadline, frequently.

Due to the fact that when the Terminal man arrives for [fol. 167] his delivery there may be another man behind him from the National Stock Yards, another man from the lower Yard, which naturally would go on the freight track and no way to get back, the tracks are not open for the caboose movements.

There would be an average of between fifty minutes and one hour delay on this forty-car train from the Terminal, taking a cut back to the Terminal, with a caboose over what there would be without one. That would only be the delay in our own Yard. The maximum or top figure of our delay would exceed one hour, not including any delay in the C. D. Yards.

The only delay would be forty-five minutes back to get his caboose from the west end of our Yard assuming the cut of forty cars came over to our Yard and was not going to take a cut back to the Terminal, and assuming that they would not have to come with caboose to the west Yard.

I would say an average of about nine cuts a day come in our Yard brought in by Terminal crews. That is based on the business situation at the present time.

We have cabooses on cuts that our engines take over to the Wiggins Ferry 2 Yard and Merchants Bridge at Madison. We do not go to C. D. Yard. We have delays by reason of those cabooses we use on these runs. We have cabooses for deliveries to and from our lower Yard, to and from Terminal at Madison, to and from Wiggins Ferry. The same thing applies to our crews bringing delivery in our Yards as to the Terminal Railroad in handling cabooses. We have to go back or bring cuts to them. We have sub- [fol. 168] stantially the same delay the Terminal has in placing cabooses.

We make two trips a day to Wiggins Ferry No. 2 Yard and two trips a day to Madison Yard.

It would not be practical to leave cabooses standing around the Yard wherever they may be. Caboose tracks should be designated for storing them.

With every movement the crew would have to go down and get a caboose off of the caboose track wherever located, and bring it back up and put it on the rear end of the train.

The rear brakeman would not ride upon the caboose at any other time except in going from one Yard to the other and in coming back. He would not use the caboose in making up his train. He doesn't switch with his caboose at all.

Cross-examination.

By Mr. Marks:

With reference to doubling to our cabooses, I meant that for delivery we sent to our lower Yard which only consists of five or six cars of house freight.

I think it would be an efficient or practical movement for the engine on a cut of thirty or forty cars coming into the Pennsylvania Yard from C. D. to come down Track 2, assuming it were open, and pick up the caboose at the south end, come back again northward on Track 2, drift that caboose in, let us say 5, 6 or 7, whichever is open at the particular time, come up, pick up a cut of cars, let us say of thirty cars, going back to C. D. and double that cut of cars up back against the caboose, if you could guaranty the tracks being clear when he was ready to make his double. [fol. 169] You could not guaranty a third track to do this operation. There is only one track he could use to make his double over and that is used in both directions, by inbound and outbound passenger engines, inbound and outbound freight engines. I would say it would take about twelve minutes to make this double.

I estimated approximately fifty minutes to an hour that would be time classified as delay, if a caboose were used from C. D. coming into the Pennsylvania Yard.

Cross-examination.

By Mr. Schwarzbach:

I did switching for one year in 1917. I was helper and foreman. Switching is considerably different today than

it was in 1917. Engines are larger, rails are better and you can switch 110 per cent faster.

The Pennsylvania provides cabooses for our crews in making deliveries all the year round. We have a caboose track in the Pennsylavnia Yard. All of our cabooses are on the caboose track and that saves time.

Our engine cuts off at the interchange track and proceeds north to the Yard office for his orders. The rear man walks up to the head end of the cut. Sometimes the engine comes up and delivers cars before the rear man gets on. On a cut of cars that rear man must be with the engine when he proceeds. I would say it would take the rear man about ten minutes to walk a cut of forty cars.

Assuming the engine came back and picked up the caboose, if he came back through the clear track, he would [fol. 170] save about eight or ten minutes' time instead of waiting for the rear man to walk to the engine.

Referring to Respondent's Exhibit 36, with reference to October 27th, on which eight deliveries to the Pennsylvania were made on that particular date, I would say it would take him fifteen minutes to go from C. D. Yard to the Pennsylvania Yard, assuming he had a cut of forty cars. I would not say whether every one that came in from the Pennsylvania went back with a cut of cars. I would estimate that they came back with a cut of cars five to seven times a day. I did not examine the records before I testified here. That is our regular work, from five to seven times a day.

I do not charge making up a train to caboose delay on Terminal delivery. We have the same caboose delay with the Pennsylvania crew.

The Pennsylvania have had cabooses in their transfer runs around a couple of years. In a similar Yard the switching could be similar to that in Pennsylvania Yards.

We carry flagging equipment in the cabin. Red flag by day, white and red lights by night. No torpedoes and no fuses. The pooling of cabooses does save time in my opinion.

We would not allow the Terminal to have cabooses in our caboose track.

There would not be any time saved due to the fact they would have to go up and switch them back.

Redirect examination.

By Mr. Campbell:

We would not permit the Terminal to keep a few cabooses [fol. 171] on our track. Assuming that they would keep a few over there and they came over from the C. D. Yard with caboose already on the cut they brought over, they would have to either leave that if they got the cabooses off of our track they would put the caboose away on our track, our switchman would have to do that because that is a switching operation in our Yard. That would take the time of our crew. Our caboose track is opposite our westward Yard lead on the south end.

Our speed limit is governed by the movement on our running track at such a speed, that we can stop shortly for any obstructions.

There is no speed limit attached. We must be under control at all times, between 10 and 15 miles an hour.

Since 1927 I have had general charge and management of the switching crews in our Yard. I have the right to give orders and I see them switching from time to time. I do not do any switching myself.

The double over movement is not a practical movement in handling cabooses, due to the fact it is a whole lot easier to take a caboose up and put on delivery rather than pull thirty or forty or whatever cut may be and shove against the caboose. It may block three or four movements.

The only one we do that on is our house cut and that is four or five or maybe six cars. That would take about four or five minutes and when you tie up the Yard four or five minutes you block considerable.

[fol. 172] Walter H. Rolen, witness on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination.

By Mr. Campbell:

My name is Walter H. Rolen. I reside at 2022 North 21st Street, East St. Louis. I am the Yard Master at the C. D. Yard of the Terminal Railroad Association and have been since 1912. I worked as switchman for the Terminal for

three years, from 1909 to 1912. My hours of duty as Yard Master are from 6:00 P. M. to 6:00 A. M. I supervise the moves in the Yard and am familiar with switching movements there, and trains to another transfer point.

Switching and making deliveries to other railroads and putting cuts of cars together is done in the Yard.

We switch cars to the Pennsylvania, L. & N., Baltimore & Ohio, Illinois Central, M. & O. South, Wabash, Big Four, the Q., that is the east side connection, and the St. Louis connection, Pacific, Frisco, Rock Island, the Katy and the Wabash West.

Cuts going to St. Louis connections travel over the Eads Bridge and the Merchants Bridge. We have connections to both bridges.

Wiggins crew is the only crew that have cabooses at the present time.

Having cabooses on all of these transfer runs in and out of our Yards would cause so much delay in handling the cabooses that it would cause it to probably miss connections on a lot of our perishable freight because of the delay in handling the cabooses.

[fol. 173] The delay would be caused in taking the cabooses from one end to the other, I would say probably thirty minutes.

If we had a caboose on the run to the Pennsylvania we would have to take the caboose down through the Yard and the tracks are about forty or forty-five car lengths long, and whether or not on the north end of the track, there you would meet with a lot of delay from work on the leads on both ends of the Yard, making deliveries on both leads, that would make a delay there.

It would be necessary to have a caboose track to keep cabooses on.

Assuming there is a run to the Pennsylvania and the cut was made up as it is made up now of 240 cars, we would have to use this engine making the Pennsylvania delivery or get another engine to do it, and go get the caboose and place it at the rear end and connect it there. In order to get the caboose to the north or hind end of the train we had to pull it there.

We have an engine switching on the lead at both ends and this engine would have to wait until this engine got off

the lead and there would probably be a delay going over to the lead, the Q. goes over to the stockyard and the Merchants may be pulling in, there may be a train pulling in there from St. Louis, as there are various moves there. We have eight crews there on the first shift and then we have the Merchant crew and the St. Louis crew and the Trunk Line crew.

I believe the St. Louis crews work about five on each shift. The Trunk Line crew makes an average of two or three deliveries on a shift, sometimes more than that.

[fol. 174] We do have cabooses on the Dupo Yard. I have seen times when the Dupo engine would be delayed one hour or one hour and a half before we could get the caboose. They pull in their trains eastbound and we had to give them an engine and the yard is congested and a lot of times the runs are all blocked.

The average delay in our Yard in using a caboose would be about thirty-five or forty minutes.

I would say thirty minutes in our Yard would be a fair illustration, if we put cabooses on all of our runs, of the delay.

Cross-examination.

By Mr. Marks:

I imagine they have a speed limit in our Yard of 10 miles per hour. The engines go through there at different speeds.

It would be necessary, if cabooses were used, to take a caboose in every instance the e[illegible] length of the Yard. There are two or three cabooses stored in the Yard now. We keep one at the hump that we use on the Yard crew that handles trains over the Merchants Bridge, and the work train has a caboose.

If there was a caboose storage track at the north end of C. D. and a train came from the south end with a caboose on it, the classification engine could take the caboose in on the storage track at the north end. He would have to get on to it, they probably would be doing some other work and have to finish before they could go in and get the caboose; that engine is not standing there waiting for this one particular move. It would have to be done after the engine was on the delivery had coupled up to them.

[fol. 175] Cross-examination.

By Mr. Schwarzbach:

The only caboose delay would be, as the delivery of this caboose was going on, the engine handling this caboose out of whatever track they were getting it off of and placing it on the train. The only caboose delay would be the time the engine would go to get the caboose and take it and place it. Coupling up the air hose would not be charged to caboose delay.

I don't see where it would save any time if you took a caboose out of the caboose track and went to the north end of the Yard or if you had to get the caboose at the south end of the Yard and take it to the north end. The way you have got it there, this is the track we would use for a caboose. A caboose could not be handled the same way all the time, and whether there would be a saving of time is to be seen.

The approximate length of the C. D. Yard is probably 2 miles or 1½ miles.

If you wanted to get a caboose over to the north end of the Yard the engine would have to go to the south end, back up the caboose and take it to the north end of the Yard, a distance of approximately forty-five cars in length. If we had a convenient caboose track in the middle of the Yard he would not have to go to the extreme south end or forty-five cars lengths, there would be a saving of time.

If an eastbound engine was switching the lead and the cabooses were near the north end of the Yard, he probably could get it under twenty minutes, and there would be a saving of about ten minutes, if the caboose was in the north end of the Yard.

[fol. 176] I would say it would take the engine three or four minutes to run both ways of forty-five car lengths under normal circumstances.

In estimating a thirty-minute caboose delay in this Yard, they would have to go on the caboose track and it would take three or four minutes. These cabooses they have are kept on the south end. If the caboose was on the north end that would be the longest time.

We have approximately forty tracks in the Yard.

Near the center of the Yard would be a convenient place for a caboose track. The caboose track would run the entire length of the Yard.

The engine would have to travel from the south end to the center of the caboose track about twenty cars length, approximately 800 or 900 feet. It would take the engine, under normal circumstances, about two or three minutes to travel to pick up that caboose.

If an engine picks up the caboose in the center of the caboose track and went to the north end to put that caboose on that train of cars at the north end, he would have to run around it and that would be the longest way. If you have a fast engine and the track was clear it would take fifteen minutes. The distance would be about twenty cars.

I would take fifteen minutes to pull off of that track onto the lead and shove it down and couple on.

An easier way would be to go through the clear track and reach down in there and get the caboose, and that would take twenty-five or thirty minutes.

[fol. 177] It would be hard to kick a caboose through a clear track forty cars length. I have seen them kick it in a track and they roll far. It might roll there. You would have to have another engine to handle it at the other end. By kicking it, you would save the time of the engine, it would not have to pull it to the extreme north end, and another engine would have to pull in and get it. There is a saving of that particular engine but there would be another engine and there would still be caboose time. That other engine would have nothing to do with reference to this particular caboose until the caboose got down there.

How much time could be saved would be determined according to how fast the caboose ran if it were kicked, three miles per hour maybe, and it might go faster. It is hard to judge the speed of a car.

I am not an expert. I didn't do any switching since 1912 and switching is quite a bit different today than in 1912. We have better equipment, better rails, bigger cars and better cars. We could handle more cars on a train today. They put a lot of cars on a train. They put on about three times as many if they have the cars.

The Illinois Central comes into the C. D. Yard and makes deliveries. It comes in with a caboose, as does the Pennsylvania and the Chicago and Alton. They don't come in with cabooses at all times. They come in with cabooses on two deliveries a day on my shift.

The Southern comes into our Yard but don't have any

cabooses. The C. & E. I. come into our Yard with cabooses, as does the Rock Island and the Nickel Plate. The Big Four does not have cabooses.

[fol. 178] We have quite a number of engines in the Yard, and under normal circumstances we have an engine at the north end and an engine at the south end.

Redirect examination.

By Mr. Campbell:

The crew at the north end is the eastbound crew and he classifies all of the cars that are received from the St. Louis connection, Madison. There are five men on this classification crew, in addition to the engineer and fireman. There is a classification crew on the south end consisting of four men in addition to the engineer and fireman.

If we kicked the caboose down the classification crew would have to come and pick it up and put it on, and it would take their time waiting for it and putting it on the train.

A caboose track would not be used for anything else except a caboose track, and that track would be taken out of service in the Yard except for the storing of cabooses.

The C. D. crews do not go to Dupo. The Wiggins crew comes in from Dupo.

If we took a track out of general switching service for a caboose track it would shorten our receiving tracks for receiving cars from other connections.

Recross-examination.

By Mr. Schwarzbach:

I imagine all Yards that have a number of cabooses have a caboose track. It takes fifteen to twenty minutes to couple up the air on transfers going to other roads for about forty cars. It takes ten minutes to pump the air in [fol. 179] forty cars. While all this is being done the engineer could go ahead and get the caboose. The train is not supposed to be moved while you are coupling the air hose. The engine could go. I would consider that caboose delay. If there is nothing else to do and the engine went ahead and got the caboose, there would be a saving of that time.

Redirect examination.

By Mr. Campbell:

The engine making the delivery has to be up there to pump the air through the air hose, through the train line. It could not be down getting the caboose and pumping the air. They would have to use another engine, to take its place.

Recross-examination.

By Mr. Schwarzbach:

You need the engine to couple up the air hose. The airman won't couple them unless the engine is there.

Objection by Mr. Campbell.

There is a rule that they cannot couple the air hose without the engine.

Recross-examination.

By Mr. Marks:

If a train comes in from the south end with a caboose on it the crew at the south end could remove that caboose from that cut of cars and take it on the caboose track. It would take a few minutes, as he would have to go from one side of the Yard to the other. It would probably take ten minutes for the crew at the south end to remove that caboose from the northbound train and kick it in. The caboose would then be available to be put on a southbound train [fol. 180] after it rolled down on the caboose track, and the crew at the north end could pick that up at the north end of the caboose track and take it on a southbound train. If they were free and had nothing else to do it would take ten or fifteen minutes.

It would probably take ten minutes for the crew at the south end to remove that caboose from a northbound train and kick it in, if the engine was right there where he could get it.

There is classification from the south end. Only cabooses coming in our Yard out of Dupo and the Trunk Lines and the Illinois Central. If cabooses were made available, there would be cabooses on the south end of the train, and they

would be classified by the south end crew or the crew that brought it in would pick it up.

The crew at the south end, even if there were no cabooses, would have to come in and couple in on the cut of cars before they switched it, that is if switched at the south end. Sometimes they don't switch it at the south end. Whether there is a caboose there they would still have to do that if they were going to couple it in the train. If they did couple into it, they would have to kick the caboose in there and it would take anywhere from ten to twelve or fifteen minutes to go and get these trains and start switching.

He would have to go down anyway, and the only delay would be in pulling out the one caboose and kicking it on the caboose track in handling that one particular car. It would take about ten minutes.

The time taken to travel that distance would have to be taken whether the caboose was on the cut of cars or not. He would have to travel on that track the distance to the [fol. 181] rear end of the train that may be five cars or ten or twenty. He would have to travel that distance if he was going to switch the train. He would have to bring his caboose out and connect it on to the train, after he travels that distance.

It would make a difference. If there wasn't a caboose he could pull out the train and go to work. That caboose is preventing him from going ahead with his work. He has to get to the end of the train anyhow, but if there wasn't a caboose he could go to work, that is caboose delay.

Whether there is a caboose or not he has to go down there to do the switching whether he comes twenty or thirty cars length.

If there wasn't a caboose there there would not be any delay in switching. I consider it delay in taking the caboose off of there.

If the crew that operates at the south end of the Yard when a train comes in is fifteen cars length from the end of the Yard on some other track, in order to perform this switching, that crew has got to come to the south end. If there is a caboose on the train, he has to take additional time to get rid of the caboose before he can start switching.

The delay would be in getting the caboose off the train. There would not be any delay for the time taken to get there.

If a train is fifteen cars in length in order to get to the end to get the caboose off and kick it in there they would have to travel fifteen cars length in and fifteen out, that is thirty.

The switching crew would have to come in and pull that [fol. 182] on the cut back fifteen cars length anyway in order to do whatever switching they would have to do with it. If a caboose wasn't on the train he could continue pulling them out and go to work.

He could not remove the caboose right off, as the air would have to be bled off it first and he would have to go and get the caboose while we were bleeding the air. The switchman has to stand and bleed the air.

They have to bleed the air, caboose or no caboose.

He pulls the cut of cars back with the caboose on it, whether there is a caboose or not, it has to be pulled back to have the switching done.

The only time that is really delay because of having the caboose there is the time taken in going in after it and setting out the caboose.

Going in after it is an extra trip.

Direct examination.

By Mr. Campbell:

It would take the time of that entire classification crew for the time it was actually going in and getting the caboose and taking it out, and in addition to that there would be the time lost of that crew getting to where it is and getting back to the next work.

Recross-examination.

By Mr. Schwarzbach:

They have to go and get the cars anyway to switch them. The only operation charged to the caboose is the operation of getting it and kicking it off.

[fol. 183] R. D. Parish, having been previously sworn, testified on behalf of the respondent, as follows:

Direct examination.

By Mr. Campbell:

My name is R. D. Parish. I reside at 627 North 11th Street, St. Louis. I have been Yard Master at Wiggins

No. 2 since 1921, until July of this year. I have been all since that time and I am now at Wiggins No. 5.

Prior to the time I had been Yard Master in 1921 I was a stenographer for the B. & O., from 1904 to 1906; and switchman at the Terminal from 1906 to 1908; from 1908 to 1909 switchman for the B. & O.; from 1909 to 1914, Yard Master for B. & O., and from 1914 to 1920, Yard Master for the Illinois Central.

I am familiar with the operation of Wiggins No. 2 Yard. It is a classification Yard, east and westbound freight from various connections, and there are transfer runs from that Yard to other Yards.

Some of the other Yards are the Clover Leaf, Wabash, the Q., Pennsylvania, L. & N., Big Four, Illinois Central, M. & O., the Southern, the Northern Pacific, the Cotton Belt, and the St. Louis Transfer. There are runs to St. Louis over the Merchants Bridge.

There are cabooses that go out of our Yard and come into it. We use cabooses on the Missouri Pacific and the St. Louis runs over the Merchant. So far as the Terminal movements are concerned, those are the only cabooses we have in and out of our Yard.

Taking the Illinois Central it takes twelve to fifteen [fol. 184] minutes, maybe twenty minutes, to put cabooses on the hind end of an Illinois Central delivery in the Yard at a designated point. On coming in the Yard there would be a six to twelve minutes delay in taking it off and putting it on the caboose track and so forth. There is a good deal of business in our Yard at both ends. We work about twenty-five engines on the three shifts, nine and eight on each shift. I would say that there are about twelve switching crews on the trunk lines that come in, in a twenty-four hour period. We have forty-nine tracks in our Yard. They are not always open so that we can get a movement right away to handle a caboose.

There are certain times of the day in the east side of the Yard when we have those tracks blocked, where the Alton and the Baltimore & Ohio use them through our Yard and make numerous moves.

The tracks in our Yard are from thirty cars to eighty-five cars length, coming off of four leads.

In handling the caboose to go to Dupo there is about fifteen or twenty minutes delay putting the caboose on the

Dupo train from a designated point, and six to twelve minutes in taking it off when it comes in.

The caboose delay on the other runs would be greater than the delay for the Dupo run because the delivery truck runs from four to twenty-seven and of course that springs off of three leads and they have to go on a different lead to get cabooses on different deliveries at different ends of the Yard, because trains enter and depart from both ends of the Yard.

With reference to the delay at Dupo in handling the [fol. 185] cabooses, from foremen's reports that are turned in at the office there is a delay of forty-five minutes to one hour and I have seen one hour and forty minutes taken at Dupo in switching and bringing it back.

Motion to strike remark with reference to reports from foreman. Overruled.

Cross-examination.

By Mr. Schwarzbach:

I received a report like that from the foreman sometime this year, the earlier part of the year. The report with reference to the delay of one hour and one-half came in during the winter of 1938. I would not go any further back.

Mr. Schwarzbach: Same objection.

The Witness: When we got through there the caboose was on a spot that we could not get to because of work being done there. Some of that delay time would be chargeable to a caboose delay. I am not able to say from that report what part of the delay time would be chargeable to caboose delay.

Mr. Schwarzbach: That is for the purpose of the objection and I now ask that it be stricken.

Mr. Daley: Let it stand for whatever value it may have, if any.

Cross-examination.

By Mr. Marks:

We do not have a regular track in our Yard designated as a caboose track, but there are tracks in the Yard used for that purpose.

The Dupo trains inbound to the Yard are served by the crew at the south end of the Yard.

In assuming that a movement entered the Yard from [fol. 186] Dupo on Track 36, and the crew working at the south end, which would be the crew to serve this particular train, had to remove the caboose before they could do any switching, and assuming they were using Track 32 to kick the caboose in before they go to work, it would take from six to eight minutes to place the caboose off of one track on the other.

Recross-examination.

By Mr. Schwarzbach:

There is a caboose track in the Dupo Yard. There are two extra cabooses at the Wiggins Yard. If the Wiggins' crew goes to Dupo they can use another caboose if they care to if it is more convenient and leave the caboose they came in with. That is a common practice.

We have a rip track in Wiggins' Yard. It is called the repair track. There are some cabooses on the rip track. It is open at both ends and is a convenient place for one lead.

The Wabash, B. & O., and Alton, Illinois Central, and Pennsylvania come in our Yard with deliveries. The Illinois Central and the Pennsylvania come in with cabooses all of the time. The Wabash, B. & O. and Alton do not come in with cabooses.

Redirect examination.

By Mr. Campbell:

When there is a run from our Yard to Dupo they do not bring back the same caboose that they take out all of the time. Sometimes they bring back a different one. There might be one at Dupo that isn't in bad order.

The delay from Track 36 to 32 in the handling of cabooses would be from six to eight minutes. There are usually [fol. 187] delays that may increase that time. There might be other movements on the lead, the engine reaching in on the hind end to take the caboose off would make the delivery and he could not set the caboose over. Without any movement on the lead, it would take ten to thirteen minutes.

or perhaps fifteen minutes, without delay, if the train comes in on 36, to go and get that caboose and take it to the rip track.

Recross-examination.

By Mr. Schwarzbach:

We could have a convenient caboose track there. As a general rule there is one good caboose at Dupo.

Recross-examination.

By Mr. Marks:

If there was no caboose on the back end of a train that came in our Yard from Dupo, the crew serving the south end of our Yard would have to go and switch anyway whether there was a caboose or not.

The delays that that switching crew would encounter would be caused by the fact that if you were going in after that train and didn't have to make a special move with the caboose you could pull the train out, there might be another crew setting on the inbound track with a big delivery and he would encounter that delay, and he would make his move and the other train would make his move, and if he came out with a cut of cars it would not be necessary to make that second move.

[fol. 188] Redirect examination.

By Mr. Campbell:

We have an order not to switch cabooses. It is a notice and has been in effect I would say fifteen years.

Recross-examination.

By Mr. Schwarzbach:

We have some shelter cabs there. I do not recall that a bulletin was issued about two years ago that we could switch with shelter cabs.

L. E. KNIGHT, witness on behalf of the respondent, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Campbell:

My name is L. E. Knight. I reside at 718 North 33rd Street, East St. Louis. I am Yard Master at the Madison Yard for the St. Louis Merchants Bridge Terminal, and have been since 1922.

I commenced for the C. & E. I. in 1905 in the Chicago Division as a brakeman and I worked until 1906 for them, and I left the railroad service for a short time. I came back two months later and went to work for them again and I worked until 1907 as a brakeman. I was promoted to conductor and left immediately and went to the Cotton Belt, Pine Bluffs and Texarkana as Yard Foreman and brakeman. I was there until June and came back to the C. & E. I. in 1907 as brakeman and extra head foreman and Yard Master, and I stayed during June and July. Then I went to the Santa Fe as a brakeman, on the Arkansas Division out of LaJauntia, and I worked there until February of 1908 and came back and hired to the C. & E. I. again as engine foreman. That was in 1908. I worked there until [fol. 189] June, 1911 and went to the B. & O. the middle of 1911, and worked eleven days and left there and went West. I wound up in Springfield and hired to the old C. P. & St. L. and didn't go to work and went to Centralia and hired to the Illinois Central and didn't go to work and went back to the B. & O. and went to work. That was sometime in July, 1911. I worked for the B. & O. from 1911 until August of 1912. Was an engine foreman and extra Yard Master. Then I went to the St. Louis Merchants Bridge Terminal and have been there ever since, except during 1920. I worked as switchman and engine foreman until 1917 and took the Yard Master's job and was on it until April 10, 1920, and I was off until August, 1922, went back then as switchman and in 1922 went back on the Yard Master's job, and have been there ever since.

I was on from 6:00 P. M. until 1930, and then I went on the 6:00 A. M. to 6:00 P. M. job.

I am not general Yard Master in the Yard, but I make all operations of engines around the Yard and I am around the Yard when on duty.

The Pennsylvania, C. & E. I., and the Wabash runs come in to our Yard, with their own equipment.

We have one run directly between Madison and St. Louis, which consists of one crew or more, sometimes there are three crews down there at the same time bringing in hot stuff.

Objection by Mr. Schwarzbach regarding the mention of St. Louis.

That is East St. Louis.

We have transfer runs between Madison and East St. Louis.

(Question withdrawn by Mr. Campbell.)

[fol. 190] We have other transfer runs come out of the Madison Yards on our rails, hot stuff from the west side. From St. Louis. That comes over the Eads Bridge or the Merchants.

We make the Missouri Pacific at Dupo, Illinois, Central, Alton and Southern, B. & O. and O'Fallon Road, and the Pennsylvania, the Nickel Plate, Illinois Central north hot stuff, the Katy, the Rock Island Carrie Avenue and Wabash West. The last four are runs over the bridge to St. Louis. We also have the Wabash East and the Troy and the C. & A. and B. & O.

For the last few years the C. & A. and B. & O. have the same Yard. They operate as one road so far as switching movements are concerned in the Yard.

We have cabooses on the Dupo run, industry run to the Illinois Transfer and anything going below Southern Crossing on the Illinois Transfer. That is, of course, from October 31 to May 1.

If you use cabooses on any runs in the Yard, I will say that you consume in the neighborhood of twenty-five to thirty minutes on any run without any delay whatsoever. That would be if everything was open and clear. It is very seldom but what they meet delays, unless they start at a period of time when nobody is operating, which would be on the relief time.

The delay is caused in movements in and out of our Yards and on our switching leads, plus the delay caused by the track not being clear, which is frequent.

You are always delayed putting the caboose over, some engine putting it over or also the crew that is getting the

[fol. 191] train is delayed putting the caboose over and it consumes twenty-five to thirty minutes more than if he put it over without delay, but very seldom you will find that you can put a caboose on without delay. That delay is in our Yard only.

I was in Dupo approximately two years ago in dull or slack business, and that day particularly when we cut loose from our train, we used twelve minutes going from the north end, about five minutes getting ahold of a caboose, and getting back in the clear for the Alton Southern delivery pulled in there, the Wiggins pulled in behind him before we could get to the main line and cross over on the lead which consumed about thirty minutes in getting to the same point we originally started from.

The delay was all entirely due to the caboose because if we had not had a caboose we could have started from the original point.

The time consumed in Mr. Thomas' test would not be the time of caboose delays we would ordinarily have day by day. Under Mr. Thomas' tests every man on the crew was in a proper place to where there was no delay whatsoever and the caboose movement consumed, I would say, in the neighborhood of one and one-half to three minutes, which under our ordinary movements of our crews will consume from five to six minutes with Mr. Thomas not being present. Naturally, every man was making all available effort for efficiency. Mr. Thomas encouraged me to have a caboose on what we call our half track so that it would be available.

If we had to have cabooses on all of the runs we would have to have a caboose track. That track would either [fol. 192] have to be taken out of service or a new track built.

I would say we would require about twenty cabooses to efficiently handle the business we have on all our Terminal runs.

Objection by Mr. Schwarzbach. Witness not qualified. Overruled.

Cross-examination.

By Mr. Marks:

The cabooses were on the half track before Mr. Thomas got there, just as they are daily, part of the time. This

particular time we made an effort to have the caboose there. I think we got one caboose from the rip track.

Classification is performed from both ends of our Yard. There are forty-seven tracks in our Yard and four leads.

There are more trains coming in from the north that are switched at the south end than at the north end, at the present time.

The Granite City runs are switched from the north end on the second or third shift. If there was a caboose on the end of such a run and it is handled at the north and serviced by the crew working at the north end of the Yard, that crew would remove the caboose before beginning to switch.

After removing the caboose from the end of such a train, the switching crew would go down and get the cut and come out on the lead to switch, and would put the caboose on the one-half track. I think it would take from five to seven minutes for the switching crew to remove the caboose and put it on the half-track.

We do not kick very many cabooses. We shove most of [fol. 193] them in and cut them off. Possibly one out of twenty would be kicked in there and rolled.

In determining the amount of time taken by reason of a caboose being on the end of such a run from Granite City, I am including the time taken from the point he started from back to the same point. From the time you pull the cut it would take from twelve to fourteen minutes.

He would have to come back whether there was a caboose on or not. We don't kick them in; we shove them in, which would consume, under Mr. Thomas' test for it which was one and one-half minutes, which would be more than doubled under ordinary conditions. The leads would be blocked possibly three minutes.

Cross-examination.

By Mr. Schwarzbach:

We have forty-seven tracks in the Yard and all are in use now. The other tracks which were cut off and are not in operation are in connection with a different Yard, that is a separate Yard. The separate Yard is parallel with Madison Yard, one adjoining the other, but they have

individual leads entirely. This Yard was closed about two years ago in June.

I was in Dupo two years ago. I haven't done any switching since 1922. The same engines and cars are used now as were being used in 1922. They have possibly added a little more weight to the rails, the main line rails. Our rails in the Yard are about the same.

The half-track in our Yard would hold about ten or eleven cabooses. We have another caboose track at the south end of the Yard which would hold about ten cabooses. [fol. 194] These caboose tracks as we have them save a good deal of caboose time.

I am only counting the time the engine uses in going and getting the caboose as the caboose delay time, which would be about twenty-five to thirty minutes.

Mr. Thomas did not notify me that he was coming, but the crew, the minute he stepped up, knew he was there.

I did not help Mr. Thomas make the tests, but I kept a record of every caboose put on and such as that.

I used my watch in timing everything, from the time that engineer was assigned until the time the work was completed. I have several notations on my work book.

The two Yards, one closed and one used, are separate and distinct Yards. They can be operated in connection with one another at the south end. There is a one-way lead, a crossover that can be operated. If we were busy and needed more tracks to operate over, we could use the south end and go into the other Yard, use both Yards. They closed the Yard because of the amount of business, it was time we closed it.

Redirect examination.

By Mr. Campbell:

The other Yard would have to be operated separately.

Recross-examination.

By Mr. Schwarzbach:

The numbers of the tracks in the closed Yard run from forty-eight to eighty-two, and in the Yard we are now using, the track numbers run from one to forty-seven, continuous numbers.

[fol. 195] Recross-examination.

By Mr. Marks:

At the time Mr. Thomas was there he made a request. He would like to have the lead engineer or some engineer put these cabooses on at the north end, and asked if it could be done. If it could not have been the lead engineer, they would have had to do it with the engine that was going to handle the train.

Ira Davis, witness on behalf of respondent, being first duly sworn, was recalled and testified as follows:

Recross-examination.

By Mr. Marks:

With reference to Respondent's Exhibit 37, relating to runs between C. D. Yard and Pennsylvania and back, I believe I said if this run had a caboose attached when it left there, took this train in the Pennsylvania Yard and brought it back, there would be from one hour to one hour and thirty-five minutes addition to the time. I estimate that where a load is taken from C. D. to Pennsylvania and a cut back to the C. D., that in that type of trip if he had a caboose added to it, it would take one and one-half hours more time than shown for this round trip without a caboose, and approximately one hour of that extra hour and one-half would be consumed in the Pennsylvania end of the run rather than at the C. D. end of the run.

During the month of June they averaged eight and three-quarters trips per day for a thirty-day period, that is a round trip made to Pennsylvania, including the trips where they went out light and brought a train back or went out [fol. 196] with a train and came back light.

If a load was taken to Pennsylvania and the engine came back light the delay would not be as great as it would be where he had to come back and get the caboose and take it to the westward Yard.

I did say that a man spends about eleven minutes in each direction in the caboose on a trip of this kind, and he uses

the rest of the time getting rid of his train and getting a train for the return trip. He helps to couple up his train in the Pennsylvania Yard.

Cross-examination.

By Mr. Schwarzbach:

I did switching in 1920, from April 4th to along in June or July. I did switching at intervals at all times up until about 1927. I did regular switching from 1904 to 1911.

The rear switchman on the Merchants Bridge rode in the rear car. The side clearances there weren't good but the overhead were, to clear a man standing on top of a car, depending of course on the height of the car.

In ordinary cars a man can stand up on it but some of the new cars they are building, the limit has gone so high that I would not say, I don't know the exact height of some of the new cars they are building. It is not a violation of our operating rules for a man to sit down or stand up on a coal car. The rule reading "Riding on the inside of loaded open top cars is prohibited," has not been applied for years. That is a rule in our operating book.

I recall an accident that occurred on the Eads Bridge; [fol. 197] a fellow by the name of Harry Mueller was riding the rear drawbar and he was jerked off of the car.

He just returned to work the first of this month. It was a serious accident. I could not say of my own knowledge whether this accident could have been avoided by the use of a caboose.

There was an official of the Terminal and somebody representing the Brotherhoods with Mr. Thomas at all times whe.. he made his test runs. Mr. J. A. Matheson, Jr., was the official who made all the tests with Mr. Thomas. They made a report of the test runs to the Terminal office.

I made tests but we didn't run just to see what the delay was on the handling of cabooses. We went to Dupo on tests a couple of times. We made the first test right after this complaint was filed, about two years ago. I made a test of the Pennsylvania Railroad last spring during the coal strike in the east. That was the last test I made. I was in the Rose Lake Yard when we ordered a car in there light from Madison to get 125 coal cars from the Missouri Pacific for Dupo.

I did not make a report of the test run to the Terminal Railroad or anybody else. I did not discuss these runs with Mr. Thomas at any time.

With reference to Respondent's Exhibit No. 31, assuming that a train of cars would come up from the C. D. Yard into the Pennsylvania Yard with a caboose, the cut would move eastward over the running track, and move over the inspection pit, being almost opposite Lincoln Avenue. He would move eastward until he cut his engine off up near about Allen Avenue or the Yard office at Rose Lake. His day is complete when he delivers his bills to the Yard office [fol. 198] at this point. The caboose is on the rear end of the train of this receiving track. He cuts it off and leaves it in the clear. Thus far there is no caboose delay.

Assuming that there is a train of cars to be taken back to C. D., and assuming that one of three tracks were open, he would return on down a clear track and pick up his caboose. I think that would be ninety cars ~~length~~, a little better than one-half mile. I would not want to say the length of time it would take an engine to come back and pick up that caboose, on account of speed restrictions. Our Yard movements like that would be six miles per hour.

It would take him about five minutes to pick up the caboose. It would not take very long to couple up the caboose. The time going back would be approximately the same if there was a clear track. In other words, there would be a caboose delay of ten to twelve minutes.

If we did not have a caboose it would take the hind man at the end of the train of cars approximately eight to ten minutes to walk that one-half mile.

When I say there is a delay of one hour in the Pennsylvania Yard I do not know that of my own knowledge. I am taking their word for it.

With reference to the test to Dupo, we had about seven minutes delay in No. 2 Yard putting the caboose on the train, going and getting the caboose and putting it on the rear end of the train. The caboose was on one of the rip tracks. The lead engine was in the south end of the Yard. No time would be saved if the lead engine was in the north end of the Yard. We had seventy-six cars on [fol. 199] the train and at Dupo he came back and got his caboose and took it up and cut it in on his train. He had cars behind his train that didn't belong to him and cut it

in his train, on his train, probably to the rear end of his train and proceeded to the south end of the Yard and cut his train. That is not a normal condition, so that if conditions were normal he could have saved a part of his time of cutting his caboose in on the train.

The Illinois Central delivers to us at the Merchants and also the C. D. and Wiggins. They have cabooses coming in the Wiggings and the C. D. I don't know about the Merchants. They have a connection with the junction, I would not say whether they have cabooses when they come in or not. All lines of East St. Louis deliver in our Yard or on our connections on the east line. The Pennsylvania crews have cabooses at the Wiggins Yard and at the Merchants Yard.

The C. & A. delivers to us to the Wiggins Yard but they have no cabooses.

The C. & E. I. delivers to us at Madison, Illinois. They have cabooses.

The Rock Island delivers to us at Carris Avenue on the west side of the river, but occasionally they come in Madison Yard and get freight. They have cabooses.

The Litchfield & Madison deliver at Madison, but I never saw a Litchfield & Madison caboose in our Yard.

The Nickel Plate delivers to us in the Madison Yard. They never have any cabooses when they come in our Yard. They leave them on their main line.

[fol. 200] I testified that at certain places it would not be a practical operation to double back the caboose, and at certain places it would.

We could not build a train to a caboose, and it is not done by any train on the Terminal, in any of our Yards.

I was referring to the State of Illinois.

We have doubled to cabooses every place where we use them.

Redirect examination.

By Mr. Campbell:

The Illinois Central comes from Valley Junction. It is about 3 miles from Valley Junction to the C. D. Yards. The C. & E. I. engines that come in our Yard with cabooses come from Mitchell, Illinois which is about 8 miles from the C. D. Yards.

Recross-examination.

By Mr. Schwarzbach:

In coming from Wiggins No. 2 to Dupo they have cabooses with them. We try to have a caboose there waiting for them and they take that other caboose on the return trip. Our instructions to the Yard Master, if they can have a steel underframe caboose to leave it in Dupo, but on account of other cabooses which we have, we have experienced so much damage there that they will not put them on the caboose track. They switch with the caboose. They leave them on the rear end of the train.

The Dupo Yard is a Missouri Pacific Yard. We cannot make arrangements with the Pennsylvania to have an extra caboose or two there.

[fol. 201] R. B. Thomas, having been previously sworn, was recalled by Mr. Schwarzbach, and testified as follows:

Mr. Saunders, I believe the engine foreman, accompanied the tests made at the C. D. Yard and after that Mr. Matheson, Jr., I think it was, accompanied all the tests that were made.

My watch may have been a minute faster or their's may have been two minutes faster. We checked them when I was finished with the operations.

The time did not vary very much. As a matter of fact there were four of us checking most of the time. A member of the Brotherhoods, Mr. Butler, myself and a representative of the railroad. When we would perform a test, before the test was made it was discussed as to what would be considered caboose delay for a particular operation, and we usually stood off to the side and the caboose was handled by the train, the time taken from the point where we had decided that caboose delay should be started until the time the engine returned to its normal operation, and then we would check with one or the other, one may have seven minutes and one seven and one-half minutes the other eight and that is the best I can explain as to how we made our checks.

I heard some estimates of time that didn't agree with the time that was checked in the field.

Mr. Campbell: We have never contested Mr. Thomas' time and do not intend to, but what he did on the particular run.

Mr. Schwarzbach: I will withdraw the question, the explanation of Mr. Campbell clarifies it.

[fol. 202] Mr. Campbell: What I mean to say, we never contested that Mr. Thomas actually recorded the time as he explained it between here and there and the other place. We do have some argument with him with what constitutes ordinary delay.

W. A. Satterfield, having been previously sworn, was recalled as a witness for further examination on rebuttal by Mr. Schwarzbach, and testified as follows:

As far as I know I am still connected with the Terminal. My regular assignment now is foreman of three deliveries on the second shift from 3:00 to 11:00. I have been foreman on this job about one month. Previous to this assignment I was head switchman on the first shift on two deliveries from 7:00 A. M. to 3:00 P. M. I was head switchman on this assignment a little over four months.

I went to the Pennsylvania Yard practically every day that I was working that four months.

For practically seventeen years I have made deliveries from the Terminal to the Pennsylvania, as switchman, and have received trains of cars from the Pennsylvania to the Terminal.

In the four-month period, under ordinary circumstances we would always bring a train back, usually we would bring a train back on this job.

According to my knowledge of switching there at C. D. it has been the custom to make a delivery with the Pennsylvania, dead freight, once in eight hours, making approximately three in the twenty-four hours.

I do know from my own observation and knowledge that the Yard crew in the Pennsylvania Yard built up trains of cars against a caboose.

[fol. 203] I would say ninety-five per cent of the time in this four-month period that I made trips to the Pennsylvania, we would have a delay waiting for cars from thirty minutes to one and one-half hours, when the members of the crew that I worked with, would have to wait there for the Pennsylvania to switch one train or two trains to put

in on Track 6, which is the bridge classification track, and I observed the switching, and in that Yard every morning I would notice they would have a caboose and part of a train in on Track No. 5. It made it very difficult to couple up cars in there, and Pennsylvania on this track would have their engine down on the track connecting cars to the caboose into this track and to my knowledge this track was not clear at the other end east of the caboose. There was always a cut of cars that had been switchetd into the track from the other end. They connected cars every day out there against the caboose and on Track 4 they had another run there which they would usually double and cut cars off of 4, against the caboose. On Track 5 they would kick the cars in on the caboose.

Every morning I would notice the Pennsylvania Yard crew doubling to a caboose.

Cross-examination.

By Mr. Campbell:

I was on the run from C. D. to Pennsylvania and back for the four months prior to the time I was on this job and I have been on this job about one month.

In my judgments, there are three or four round trips made to the Pennsylvania on each shift, from the Pennsylvania [fol. 204] to East St. Louis there are only three or four round trips made within a twenty-four hour period.

I would classify dead freight as trains not put on these through line trains as manifest cars or red ball freight, slow freight, the time of delivery of which isn't so important as distinguished from hot freight. The contents of the freight would not be damaged if delayed three or four days.

Practically all we have moved into East St. Louis out of the Pennsylvania has been dead freight. We have a lot of hot freight moving from East St. Louis.

They do not want perishable stuff in the regular deliveries. They run a number of engines out of there with perishable freight.

I have seen the Pennsylvania build up a train to the caboose. In the one Yard at Rose Lake, I have seen them do it on different tracks. I have seen them double up on Track No. 4 at different places.

L. W. CHEATHAM, having been previously sworn, was recalled as a witness for further examination in rebuttal by Mr. Schwarzbach, and testified as follows:

I heard Mr. Knight testify here this morning.

We do kick or shove cabooses to the caboose track in the Madison Yard. We handle these cabooses into a caboose track the same as we would a car.

Cross-examination.

By Mr. Campbell:

If it is more convenient, ordinarily we kick them, we don't shove them. We always kick them off the rear and [fol. 205] into the caboose track and generally a switchman rides them into the caboose track. A switchman rides them in when we kick them, and he has to come back and join his engine.

IRA HITCHENS, witness on behalf of the petitioner having been first duly sworn, was examined in rebuttal by Mr. Schwarzbach, and testified as follows:

My name is Ira Hitchens. I reside at 1525 North 55th Street, East St. Louis, Illinois. I am head brakeman for the Pennsylvania Railroad and have been since September, 1920. My duties are in the Rose Lake Yard of the Pennsylvania.

We use cabooses on all deliveries except cuts to the Alton and Southern and stockyards, and I am familiar with the use of cabooses, as we use them every day.

Assuming that we took a train of forty cars with a caboose, entering the Willow Towers we receive a plat signal, that is a dwarf signal, low home signal from the tower. And as you pass the tower, ordinarily and customarily the tower man will hold a sign up, one, two or three exchange track, and if you would not receive that sign he would call the Yard for the Master, for a track. He tells you No. 1 Interchange, and you pass over the pit, four cars per minute. You go to the east end of the Exchange Track which is 520 feet from the yard office opposite the Yard and of the train to an air plug for an air test. The caboose would be twenty-eight cars from the end of the track. We would leave the caboose in the clear. I think it would be Tin Cup [fol. 206] Alley. You stop the head end of the train at an air hose, which is connected for a Terminal Yard air test.

The Yard Master's office is in one building 520 feet from where the engine is cut off of the train, that is 520 feet east of where the train is cut off.

Assuming that we went to the Yard Master's office and got instructions that there is a loaded train of cars to be taken back with a different caboose, when you call for a track, either the Yard Master or the pitman tells you what interchange he was going back in to pick the caboose up. If you are going to pick a caboose up, the fireman or flagman drops off at the switch and has the switches lined up and the Yard Foreman cuts the caboose off in the clear. Then we go back and pick up the caboose and come back to the interchange track. It would take fifteen minutes to pick up the caboose and bring it back from where the engine first started. That is the round trip. Under ordinary circumstances, it would take the hind man from eight to ten minutes to walk to the engine. If we had a caboose and the engine came along and picked up the caboose, with the hind man, there would be a saving of about five or six minutes.

Assuming we had a train of cars on Track 6 with this engine and caboose, the Yard Master would tell you to go through 9, 8 or 7, possibly No. 1, and if we went through 9, 8 or 7, the caboose delay would be approximately twelve to fifteen minutes. If we went on No. 1, the caboose delay would be approximately twenty minutes.

The entire caboose delay would be, fifteen minutes at the outbound Yard and twelve to fourteen minutes at the southbound Yard, or a total of twenty-seven minutes.

[fol. 207] I have seen Pennsylvania crews build up against a caboose and I have seen the crews double to the caboose, practically every day.

If the Terminal Railroad had an extra caboose or two in the Pennsylvania Yard there would be a lot of caboose delay time saved.

When we first got cabooses on the Pennsylvania they did not allow us to switch cars against a caboose. We changed superintendents and they permitted us to switch cars against a caboose and there was no delay as far as operating with the Rose Lake Yard on the Pennsylvania is concerned, on the handling of cabooses. The same thing would apply to the Terminal Railroad when cars are switched to No. 6 before the cars are put in there, I should say, the cabooses can be put on the track and the cars shifted into that track.

With reference to pooling cabooses in the Pennsylvania Yard, there is no crew that has a regular assigned caboose.

The Pennsylvania records show that the pooling of cabooses, not only for road crews and Yard crews, has eliminated caboose time, to a very small fraction. On trains leaving eastbound ordinarily the caboose is the first car put in the track and the cars shifted into that track.

Cross-examination.

By Mr. Campbell:

Speaking of Yard movement, the cabooses are brought in, line up with what is known as westbound and as the westbound are shoved up the cabooses are switched out on No. 7 track, or No. 5 track. The Yard cabooses are not kept on caboose tracks.

[fol. 208] A draft of cars comes from the connection, the caboose is left on the rear end of the cut and when we go to the other Yard to get a draft of cars, the caboose is already on the east end of the delivery. It was put there by the crew that shoved the west end cars from the east to the west.

The Pennsylvania has only four cabooses. The Terminal would have to have at least two.

With reference to doubling, on deliveries from the Terminal delivered by the Pennsylvania, if it is a caboose, they can get on the track they put it there, and if not, it is put on the Yard or some other track and we double to it.

I would be in no position to know whether the Pennsylvania would permit the Terminal to keep some of their cabooses in their Yard for their use.

If they cannot get a clear track there would be added caboose delay.

At the present time that is a pretty congested Yard, but normally we have about three clear tracks into the classification Yard and No. 3 interchange track is the last track that is blocked.

Redirect examination.

By Mr. Schwarzbach:

If there is a delay in the Pennsylvania Yard because a train wasn't made up and the crew had to wait one-half hour or so, I would not charge that to caboose delay.

The running track is supposed to be clear all the time and is clear from the Yard office to the Willows all of the time.

[fol. 209] Recross-examination.

By Mr. Campbell:

There would be nothing preventing them from doubling to the caboose if when they were ready to go and get the caboose and could not get a clear track there. They could get to the westbound Yard and as they pass the eastbound Yard they could double to it.

There may be occasions when there would be an engine and cars on the track to the Yard office and they could not get a clear track. There might be ten minutes' delay. There would be no occasion when they would have to wait to put their caboose on because they could spot their caboose on 3, 4 or 5, and double to it. That would not take any more time than to cut the caboose off and somebody ride it in.

Proofs closed. Case heard and taken.

February 1, 1940, order entered by the Commission.

February 15, 1940, motion filed by respondent for postponement of date of operation of order pending application for rehearing.

February 20, 1940. Petition taken under advisement.

February 26, 1940, application filed by respondent for rehearing of case.

March 5, 1940, answer filed by complainant to application of respondent for rehearing.

March 5, 1940, Supplemental Order entered by the Commission.

March 6, 1940. Order of Commission petition for rehearing denied.

March 25, 1940. Copy of Notice of Appeal filed with [fol. 210] Illinois Commerce Commission by Terminal Railroad Association of St. Louis, respondent, from order entered February 1, 1940, to the Circuit Court of St. Clair County, Illinois.

Commission's Exhibit 1. Report of R. B. Thomas, Chief Railroad Inspector:

Summary

1. The estimated annual crew wages for handling cabooses on transfer runs between C. D. Yard and, the Penn-

sylvania Yard, the I. C. Yard, Mobile Yard and Southern Yard ranges between $4,828.32 and $7,543.39.

2. Other delays incident to transfer and switching operations deducted from caboose handling time reduces caboose delay.

3. The initial cost of shelter cab No. 345 (caboose) was $1,233.69.

4. Caboose handling time applied to test runs originating in C. D. Yard would not affect the connections made in the Pennsylvania Yard, the I. C. Yard, the Mobile Yard or the Southern Yard.

5. The use of a caboose on the above runs would preclude the necessity of the rear switchman riding on the drawbar, top or side of the rear car. The caboose would also provide a place to store flagging equipment, lunches, wearing apparel and the like as well as offer stove heat and shield the rear switchman from the elements.

If cabooses were made available, in our opinion six would provide the facilities for delivery runs between C. D. Yard and each of the following Yards: Pennsylvania, Mobile, I. C., and Southern. The estimated initial cost of six shelter [fol. 211] cabs would be $7,402.14 and the estimated maximum crew wages would be $7,543.39, making a total of these two items of $14,945.53.

Report

History: On March 4, 1938, the Brotherhood of Railroad Trainmen, Richard Abram, Chairman, filed a complaint relative to failure to supply cabooses in connection with switching operations on the Terminal Railroad Association of St. Louis. Several hearings have been held and from the record in the case it appears that each side has closed its case in chief, reserving the right however for rebuttal and cross-examination in connection with the contents of this report.

General: The Terminal Railroad Association of St. Louis performs among other things terminal services in the switching district of East St. Louis for and on behalf of its proprietary lines and other railroad companies desiring use of its facilities.

The corporate control of the Terminal Railroad Association of St. Louis is vested equally in each of the following

railroad companies (page 105 of 1937 Annual Report on file with the Commission):

The Alton Railroad Company.
Baltimore and Ohio Southwestern Railroad Company.
Chicago and Eastern Illinois Railroad Company.
Chicago, Burlington and Quincy Railroad Company.
Chicago, Rock Island and Pacific Railroad Company.
Cleveland, Cincinnati, Chicago and St. Louis Railway Company.
[fol. 212] Illinois Central Railroad Company.
Louisville and Nashville Railroad Company.
Missouri-Kansas-Texas Railroad Company.
Missouri Pacific Railroad Company.
Missouri Pacific Railroad Company, account St. Louis Iron Mountain and Southern Railway Company.
Pittsburg-, Cincinnati, Chicago and St. Louis Railroad Company,
St. Louis-San Francisco Railway Company.
St. Louis-Southwestern Railway Company,
Southern Railway Company.
Wabash Railway Company.

The Terminal Railroad Association of St. Louis is engaged in performing Terminal services in the switching district of St. Louis and East St. Louis and a trans-Mississippi service between said districts, for and on behalf of its proprietary lines, and other railway companies desiring the use of its facilities.

Three separate and important Yards are maintained and operated by the Terminal Railroad Association of St. Louis within the East St. Louis switching district. This report is confined to the activities of one of these Yards, namely, the Central District Yard, commonly known as the C. D. Yard, and further limited to cover operations only within the State of Illinois. The switching and transfer work is carried on continuously throughout the twenty-four hours of the day by crews working in shifts of eight hours each, there being the first, second and third shifts each day. In each shift there is usually a lead engine (being an engine [fol. 213] used primarily for classification within the Yard) assigned to each end of the Yard. There are also three to four delivery engines assigned to delivery work, the number of course being dependent upon the volume of business.

Methods Employed to Secure Information and Data—

1. General acquaintance of operations and system of Yards involved, by observation, study of maps, and records.

2. Actual riding of runs and switching operations with and without cabooses.

3. Chronological record of activities by time.

4. Interrogation of employes followed by inspections or investigations.

5. Actual use of shelter cab No. 545 in connection with operations.

6. Photographs.

For the sake of brevity and convenience, railroads, Yards and the like have been designated under such terms appearing opposite and to the right and will be used hereinafter in this report.

Name	Designated Term
1. The Alton Railroad Company	Alton
2. The Baltimore and Ohio Railroad Company	Baltimore
3. Central District Yard	C. D. Yard
4. Chicago, Burlington & Quincy Railroad Company	C. B. & Q.
5. The Cleveland, Cincinnati, Chicago and St. Louis Railway Company	Big Four
[fol. 214]	
6. Illinois Central Railroad Company	I. C.
7. Litchfield and Madison Railway Company	Litchfield
8. Louisville and Nashville Railroad Company	Louisville
9. Mobile and Ohio Railroad Company	Mobile
10. The New York, Chicago and St. Louis Railroad Company	Nickel Plate
11. The Pennsylvania Railroad Company	Pennsylvania
12. Southern Railway Company	Southern
13. Terminal Railroad Association of St. Louis	Terminal
14. Wabash Railway Company	Wabash

Description of C. D. Yard

C. D. Yard is located a short distance northwest of the Relay Station at East St. Louis and is approximately 2400 feet in length, consisting of approximately 75 tracks. It is divided into what is known as the Hump Yard or west Bound Classification Yard, the West Bound Receiving Yard, Hold Tracks, the East Bound Receiving Yard and the East Bound Classification Yard, and forms one of the axes for extensive interchange service in the East St. Louis area. The tracks in this Yard vary in length from 500 feet to 2400 feet but the majority of the tracks are over 1500 feet in length.

A blue print map of the city of East St. Louis, showing among other things the location of C. D. Yard, the Pennsylvania Yard, the Southern Yard, the I. C. Yard, the [fol. 215] Mobile Yard and the routes followed by transfer runs being indicated thereon, is to be found in Appendix 1 at the back of this report.

Analysis of the practice followed during the investigation of handling transfers between C. D. Yard and foreign trunk line Yards—

Legend

(a) By Terminal
(b) By foreign trunk line
(c) By Terminal and foreign trunk line

	Inbound C. D. Yard	Outbound C. D. Yard
Alton	c	c
Baltimore	c	a
C. B. & Q.	b	c
Big Four	b	a
I. C.	b	a
Litchfield	b	c
Louisville	b	a
Mobile	c	c
Nickel Plate	b	c
Pennsylvania	a	a
Southern	c	c
Wabash	b	c

Result of Riding Runs—

A study was made of, and the engines were ridden on, the general delivery runs made by the Terminal out of

C. D. Yard to the Pennsylvania near Fairmont City, the Louisville Yard, the I. C. Yard, the Southern Yard, known as Coapman Yard, the Mobile Yard known as Tolsom Yard, the joint Yard of the Alton and the Baltimore, the Big Four Yard, lying immediately north of Bridge Junction, the Hunter Packing Company and the National Stock Yards. [fol. 216] Graphs of the above mentioned runs have been prepared and are to be found in Appendix 2 at the back of this report. The abscissa of the graph represents the time interval, each small horizontal space being one minute. The lower line of the graph represents the period of time when the engine was standing. The upper lines represent the interval of time the engine was moving, either within C. D. Yard or out of it, the latter movements being represented by horizontal lines above the former. The time interval spent on foreign main line tracks is indicated by figures.

Graph "A" represents the engine movements throughout the work period of the first shift crew on General Delivery No. 1 from 8 A. M. to 4 P. M. on December 14, 1938. It will be noted from the graph that this crew worked in C. D. Yard and also to and from the icehouse from 8 A. M. to 9:32 A. M. It then delivered a cut of 19 cars to the Pennsylvania Yard returning to C. D. Yard light, arriving at 10:29 A. M., making the round trip in 57 minutes. The engine took water and grates were shaken. Another run was then made to the Pennsylvania Yard with four hot cars, leaving C. D. Yard at 10:54 A. M., returning light and arriving at C. D. Yard at 11:44 A.M. Switching was performed in the Yard and within the Bridge Junction area until 12:38 P. M., at which time the crew had lunch. After lunch the crew made another run to the Pennsylvania Yard, leaving C. D. Yard at 1:26 P. M. with a cut of 14 cars and returning to C. D. Yard with a cut of 41 cars at 2:23 P. M. The remainder of the shift was devoted to switching in C. D. Yard.

Graph "B" represents the engine movements throughout the work period of the first shift crew of General Delivery [fol. 217] No. 2 from 7 A. M. to 3 P. M. on December 15, 1938; it will be noted that the engine left C. D. Yard light for the Pennsylvania Yard at 7:04 A. M., returning to C. D. Yard with a cut of 49 cars at 8:37 A. M. Delays going to and from the Yard are noted by the lower horizontal line

with accompanying explanations. After certain switching movements in C. D. Yard, a delivery was made to the I. C. Yard, with a cut of 53 cars. After stopping at the 6th St. Yard office, the run was continued to the vicinity of Falling Springs or lower Cahokia road crossing where the train was cut off, and the engine returned light to C. D. Yard, arriving at 10:40 A. M. A delivery of 23 cars was then made to the Louisville Yard, leaving C. D. Yard at 10:46 A. M., and returning light at 11:06 A. M. After performing switching in C. D. Yard, another delivery was made to the Louisville Yard, leaving C. D. Yard at 11:31 A. M. with a cut of 4 cars, and returning light at 11:45 A. M.; the engine took water and the grates were shaken. The crew went to lunch. At 12:53 P. M. a transfer of 22 cars departed from C. D. Yard, 21 of which were set out at the I. C. Yard and 1 at the Mobile freight house, the engine then returned light to the Louisville house track, immediately south of Missouri Avenue where 1 car was picked up and delivered to C. D. Yard, arriving at 2:15 P. M., the remainder of the shift was devoted to switching in C. D. Yard and in the vicinity of Bridge Junction.

Graph "C" represents a delivery made by the second shift crew of General Delivery No. 2 to the Mobile Yard between 9:10 P. M. and 10:50 P. M., December 15, 1938. [fol. 218] It will be noted that there was a 24 minutes delay encountered on this run due to a wait for a passenger train. Other stops and delays are also indicated and explained in the graph.

Graph "D" represents engine movements made by the first shift crew of General Delivery No. 3 between 8:30 A. M. and 12 o'clock noon on December 16, 1938. It will be noted that deliveries were made to the Hunter Packing Company and the Big Four Yards, the Alton Yards and the National Stock Yard, and also that some additional time was devoted to switching in C. D. Yard. It will be noted further that the deliveries made by this crew were relatively short runs.

Graph "E" represents a single delivery made by the first shift crew, General Delivery No. 2 on December 16, 1938, and shows that a delivery of 10 cars departed from C. D. Yard at 1:01 P. M. for the Mobile Yard returning to C. D. Yard from that point at 2:20 P. M. with a cut of 4 cars. Stops and delays are indicated on the graph.

Graph "F" represents a delivery to the Southern Yard (Coapman) by the second shift crew, General Delivery No. 2 on December 16, 1938, and shows that a delivery of 23 cars left C. D. Yard at 5:56 P. M. and that a delivery of 19 cars was brought back to C. D. Yard at 8:16 P. M., a delay of 41 minutes being encountered at Coapman Yard waiting for an incoming train. Other stops and delays are also indicated on the graph.

General Delivery No. 1 is considered the preferred run, preference being given to this crew to make the Pennsylvania deliveries, but other crews do make the Pennsylvania delivery at such times as Delivery Crew No. 1 is not avail- [fol. 219] able and deliveries are ready for movement. General Delivery No. 2 also makes a Pennsylvania delivery the first thing in the morning, going out light and returning with a cut of cars. It then makes other deliveries, preference being given to the I. C., Mobile and Southern deliveries. General deliveries Nos. 3 and 4 deliver cuts to the Alton, Big Four and Wabash, working as a general rule in the vicinity of Bridge Junction. These crews may also be called upon to make some of the longer delivery runs if delivery crews 1 or 2 are not available.

CABIN 1

Re-Issue

General Notice 430

ENGINEMEN AND TRAINMEN

C. D. District

C. D. District
East St. Louis, Illinois.
October 7, 1938.

The following is the running time between CD Yard and different trunk line yards and return movement, with and without trains.

C. D. to M&O Tolson Yard	
Round trip	55 minutes
Each way	25 minutes
C. D. to Penn Inspection Pit	
With train	11 minutes
Light Engine	15 minutes

CD to IC

With train	20 minutes
Light Engine	15 minutes

[fol. 220] CD to Southern Coapman

With train	15 minutes
Light engine	12 minutes

CD to L&N

With train	10 minutes
Light engine	5 minutes

CD or Eastbound to Alton-B&O

With train	15 minutes
Light engine	10 minutes

This time is figured on an average sized train; where conditions permit, you are expected to make better time. You are expected to move as fast as conditions and rules permit.

When approaching interlocking plant or any point where hand signals are required enginemen will call for signal with locomotive whistle so as to attract attention of those in charge.

Hy. Miller, Jr., Assistant Superintendent.

[fol. 221]

Analysis of Time Taken for Deliveries

Delivery	Graph	Date	Outbound CD Yard Cars	Total Time	Delays Enroute	Net Time	Inbound CD Yard Cars	Total Time	Delays Enroute	Net Time
Penn	A	12/14/38	19	27	2	25	None	23	2	21
Penn	A	"	4	20	—	20	"	22	—	22
Penn	A	"	14	31	5	26	41	31	3	28
Penn	B	12/15/38	None	17	2	15	49	24	—	24
I. C.	B	"	53	29	5	24	None	20	3	17
Mobile	C	"	11	34	4	30	4	51	25	26
Mobile	E	12/16/38	10	32	9	23	4	27	4	23
Southern	F	"	23	31	3	28	19	37	9	28

Examination of Records in Foreign Trunk Line Yard Offices Discloses the Time of Departure of the First Car or One of the First Group of Cars in Transfers Ridden as Shown

Graph	Yard	Arrival Time	Arrival Date	Departure Time	Departure Date	Elapsed Time	Initial and Car Number
A	Penn	9:59A	12/14/38	11:45A	12/14/38	1 hr. 46 min.	NADX 1865
B	I. C.	1:09P	12/15/38	4:10P	12/15/38	1 hr. 1 min.	ART 28986
E	Mobile	1:35P	12/16/38	2:46P	12/16/38	1 hr. 11 min.	WCL 5667
F	Southern	6:27P	12/16/38	1:50P	12/17/38	19 hr. 23 min.	YNC 122689

[fol. 222] TEST RUNS MADE WITH CABOOSE—

On January 17, 1939 the Terminal at the request of the Commission's investigator furnishing a caboose (Shelter Cab 545) for a trial run on the I. C., the Pennsylvania, the Mobile and the Southern deliveries. On January 19, 1939, another test run was made to the Pennsylvania Yard. In this test a large cut of cars was handled in each direction, this not being true in the previous tests on this particular delivery.

Logs of Delivery Runs Made With the Use of Cabooses

Delivery—CD to I. C. and Return—1/17/39

Item No.		Item No.	
1	Depart 7:21 A (35 cars)	5	Caboose delay 2 M.
2	Arrived 7:52	6	Arrived CD 8:15
3	Engine passed caboose 7:59	7	Cut off 8:17
4	Coupled and departed 8:01	8	Total caboose delay round trip 2 M.

Delivery—CD to Penn. and Return—1/17/39

Item No.		Item No.	
1	Engine coupled 8:55 A	11	Switching, delivery or receiving bills 9:50–9:54
2	Coupling cars and pumping air 8:55–9:05	12	Ready to depart 9:54
3	Waiting for, or handling caboose 9:05–9:09	13	Departed 9:54
4	Caboose delay 4 M.	14	Waiting for or handling caboose None.
5	Switching or other delays 9:09–9:28	15	Passed caboose 9:58
6	Departed (24 cars) 9:28	16	Couple and Departed 10:00
7	Arrived 9:40	17	Caboose delay 2 M
8	Inspection Pit 9:40–9:47	18	Arrived CD 10:18
9	Cut off caboose 9:48	19	Cut off caboose 10:19
10	Cut off train 9:50	20	Total caboose delay—round trip 6 Min.

[fol. 223] Delivery—CD to Penn. and Return—1/17/39

Item No.		Item No.	
1	Engine coupled 10:41 A	11	Run around cut and coupled 11:11
2	Coupling cars and pumping air 10:41–10:42	12	Caboose delay 9 M.
3	Departed (22 cars) 10:43	13	Coupling out 11:11–11:14
4	Arrived 10:56	14	Whistled for air 11:14
5	Cut off caboose 10:56	15	Cut off 11:15
6	Cut off train 10:57	16	Run around cut and coupled west end 11:15–11:26
7	Engine passed caboose 10:59	17	Air man started 11:29
8	Engine coupled caboose 11:00	18	Departed 11:43
9	Caboose delay 1 M	19	Arrived CD 12:30
10	Engine and caboose moved east and passed return delivery on track 7 11:02	20	Total caboose delay round trip 10 Min.

Delivery—CD to Mobile and Return—1/17/39

Item No.	
1	Engine coupled 12:58 A
2	Coupling cars and pumping air 12:58–1:03 P
3	Switching or other delays 1:03–1:09
4	Departed (27 cars) 1:09
5	Arrived 1:35
6	Engine passed caboose 1:42
7	Engine moving caboose 1:45–1:48
8	Caboose delay 1:42–1:48
9	Switching 1:48–1:56
10	Enroute CD (15 cars) 1:56–1:57
11	Rear passed caboose 1:57
12	Coupled and departed 1:59
13	Caboose delay 1:57–1:59
14	Arrived 2:23
15	Total caboose delay—round trip 8 min.

Delivery—CD to Southern and Return—1/17/39

Item No.	
1	Boarded caboose Relay depot 5:28 P
2	Arrived 6:11
3	Shoving track 4 and coupling 6:11–6:15
4	Cut off train 6:15
5	Run around and coupling (19 cars) 6:15–6:28
6	Whistled for air 6:29
7	Air men started working 6:32
8	Ready to depart 6 49
9	Departed 7:00
10	Caboose delay—Southern Yard none
11	Arrived 7:25
12	Total caboose delay—Relay Depot to Southern Yard and return to CD Yard None

[fol. 224] Delivery—CD to Penn. and Return—1/19/39

Item No.	
1	Boarded engine 6:03 P
2	Departed (33 cars) 6:06
3	Arrived Inspection Pit 6:26
4	Cleared 6:34
5	Cut off engine 6:37
6	Arrived yard office 6:39
7	Run around cut and coupled caboose 6:41–6:47
8	Caboose delay 6 Min.
9	Passed yard office 6:54
10	Caboose delay 7 Min.
11	Kicked caboose in on Track 3 W.B. yard 6:59
12	Caboose delay allowed 1 M.
13	Moved in on track 6, coupled cut, pumped air, etc. 7:01–7:32
14	On spot 7:32–8:39
15	Departed (44 cars) 8:39
16	Stopped and picked up caboose 8:46–8:49
17	Caboose delay 3 min.
18	Arrived CD yard 9:11
19	Total caboose delay round trip 17 min.

The Delays Attributed to the Use of Cabooses as Disclosed by the Investigation and Listed Below

Delivery	Departed C. D. Yard	Date	Total caboose delay in foreign yards	Total caboose delay CD yard
CD to I. C.	7:21 AM	1/17/39	2 min.	
CD to Penn.	9:28 AM	1/17/39	2 min.	4 min.
CD to Penn.	10:45 AM	1/17/39	10 min.	
CD to Mobile	1:09 PM	1/17/39	8 min.	
CD to Southern	5:28 PM (From Relay Depot)	1/17/39	0	
CD to Penn.	6:06 PM	1/19/39	17 min.	

The following are excerpts from a time schedule concerning deliveries signed by Ira Davis, Supt. bearing date May 16, 1938.

Road	Train	Time of Departure	Time Requested	Latest Will Receive on 'Phone Advice	Remarks
IC–North	78	2:00a	12:30a	1:00a	Disp. Pers. Chi. & eastern points
	74	4:50p	2:30p	3:30p	Disp. Pers. Chi. & eastern points
	70	6:30p	4:30p	5:30p	Disp. Pers. Chi. & eastern points
	82	8:00p	6:00p	7:00p	District freight train
South	#271	2:00p	12:30p	1:00p	NCStL, Martin, Mphs. Mo. & inter. pts.
	277	6:30p	4:00p	5:30p	NCStL, Martin & Bgham, inter. pts.
	†273	7:00p	4:30p	5:30p	Mphs. & New Orleans, inter. pts.
	279	7:00p	5:00p	5:30p	Int. Cdale, to Paducah, Lsville, Ky.
	280	8:00p	6:00p	7:00p	Coal Fields & Inter. Pts.
N&O	**29	12:20a	10:00p	10:00p	Montgomery and beyond
	##53	6:00p	5:00p	5:30p	Bmgham, Meridian, Mo. Mobile & bey.
Penna.	SD—2	1:00a	12:01a	10:01a	Lstk. Pers. LPT. Thaute & east
(Note)	VL—2	2:30a	1:30a	1:30a	Lstk. Pers. LPT. Thaute & east
("C")	VL—6	3:30a	2:30a	2:30a	Lstk. Pers. LPT. West of Altoona
	(#) VL— 8	11:00a	10:00a	10:00a	Lstk. Pers. LPT. Indpls. & east
	(*) PH—10	7:30p	5:30p	5:30p	Lstk. Pers. LPT. Thaute & east
Southern	51	2:00a	11:00p	1:00a	Pers. & Time Freight. All points
(Note)	57	12:30p	11:30a	11:30a	Pers. & Time Freight. All points
("D")	59	7:00p	6:00p	6:00p	Pers. & Time Freight. All points

Explanation of Reference Marks

"C"—Freight for Penna. from Wiggins should be delivered in lower Yard, E. St. Louis, as follows: For VL–8 at 8:00a, for VL–2 at 10:30p, for PH–10 at 6:30p, and for SD–2 and VL–6 at 10:30p.

"D"—Freight for Southern from Wiggins should be delivered in Dyke Yard one hour earlier than time shown.

#—When livestock or perishable is reported for IC train 271, IC crew will wait at CD until 1:45p for same.

†—Illinois Central will accept Universal business for train 273 up to 7:30p.

**—M&O will hold train 29 until 1:00a for live stock or perishable when advance notice is given Yardmaster at Tolson.

##—M&O will hold train 53 until 6:15p for live stock or perishable when advance notice is given Yardmaster at Tolson.

Penna. will accept perishable and stock from Eads for VL–8 if by

(#)—Willows Tower at 11:15a by special arrangement of one hour advance notice.

(*)—Penna. will accept perishable and stock from Eads for PH–10 up to 6:30 P.M. by special request on one hour advance notice.

[fol. 226] CLEARANCES—

Clearances less than those prescribed in General Order 22 prevail alongside the Penn. runner track in the vicinity of Bowman Ave.

The measured distance—center line of track to a portion of a certain fence is 7 feet 7 inches and limbs of trees extend to a point 5 feet from center line of track, a height of 14 feet above top of rail.

SHELTER CABS

Shelter Cab No. 343 furnished by the Terminal for test runs was constructed by using the salvaged steel underframe of a box car and erecting a cabin thereon the width of the car and about 10 feet in length. The cabin is situated at the center of the car. Hand holds, grab irons and steps have been provided and guard rails erected. The cabin is equipped with a stove, two seats and a locker. Windows are located in the door at each end as well as in the sides of the cabin. No air gauge or conductor's valve was in evidence. Photographs of the construction details, and a completed shelter cab are to be found in appendix 3 at the back of this report. A photograph of a wooden underframe caboose is also included.

FLAGGING EQUIPMENT—

No flagging equipment other than a red lantern for the rear end at night is maintained on any of the Terminal delivery runs working out of C. D. Yard except on most of the Pennsylvania deliveries the rear end of the train during daylight hours is marked by a yellow flag.

[fol. 227] Position of Rear Switchman—

No cabooses or shelter cabs are provided for any of the Terminal crews working out of C. D. Yard. Observations disclosed that the rear switchman rode the draw-bar at the trailing end of the rear car. If the end of the car on which he was riding happened to be the end that was provided with the brake staff the switchman would grasp it as a means to secure himself in place. If not he would reach farther out toward the side of the car in order to reach the end ladder or other hand-holds. In addition he braces himself against the end of the car to avoid being shaken

off due to sudden stops and starts. Photographs showing a Terminal switchman in riding position and details of footing etc. are to be found in appendix 4 at the back of this report.

Safety—

The rear man or flagman took his position in shelter cab 545 during the course of interchange or transfer operations which precluded the necessity of his riding on the drawbar, top or side of the rear car.

Comfort—

The accommodations provide by shelter car 545 included stove heat, shelter from the elements, a place to store flagging and other equipment, lunches, wearing apparel and the like during transfer of interchange service.

Distances to Yards—

The distances which a delivery train travels from CD Yard to the following trunk line yards are shown below.

[fol. 228] Southern Yard (Coapman) 3.4 miles
(This distance is scaled to the south end of the yard as trains are shoved into the yard from that end)

Mobile Yard (Tolson) 3.2 miles
(Center to center of yards)

I. C. Yard 2.3 miles
(This distance is scaled to the lower Cahokia Road crossing as trains are usually cut off in that vicinity.)

Penn. Yard 3.5 miles
(Center to center of yards)

In scaling the above distances it was necessary to use a map having a scale of 1 inch to 1,000 feet. However, these distances are reasonably correct and will give some idea of the distance traveled by the delivery.

Estimate of Cost Due to Use or Cabooses in Connection With CD Yard—

The following estimate is based with correction factors as noted on the number of deliveries made out of CD Yard to the Penn., I. C., Mobile and Southern Yards during the week of January 8th to 14th, inclusive, 1939.

Deliveries Outbound C. D. Yard by Terminal January 8-14, 1939 Inclusive

	Pennsylvania	I. C.	M & O	Southern
Jan. 8, 1939	6	5	4	3
Jan. 9, 1939	6	5	2	2
Jan. 10, 1939	6	6	3	3
Jan. 11, 1939	7	5	3	2
Jan. 12, 1939	7	6	3	2
Jan. 13, 1939	8	6	3	2
Jan. 14, 1939	9	6	3	3
Totals	49	39	21	17–126

[fol. 229]

Estimate of Time Involved in Handling Cabooses January 8-14, 1939

Yard	Moves	Minimum	Actual	Maximum
C. D.	126 @ 4 minutes	504		
	126 @ 6 "		756	
	126 @ 8 minutes			1108
Penn.	40 @ 3 "	120		
	9 @ 17 "	153		
	40 @ 4 "		160	
	9 @ 17 "		153	
	40 @ 6 "			240
	9 @ 40 "			360
I. C.	39 @ 1 "	39		
	39 @ 2 "		78	
	39 @ 5 "			195
Mobile	21 @ 5 "	105		
	21 @ 8 "		168	
	21 @ 10 "			210
Southern	17 @ 1 "	17		
	17 @ 1 "		17	
	17 @ 4 "			68
	Total Minutes	938	1332	2081

Wages of Crew Per Day

Engineer	$ 8.03	250,000 lbs. and under
Fireman	6.07	
Switch Foreman	7.58	
2 Helpers @ $7.06	14.12	
Total	35.82	

Wages of crew per minute $ .07462
Wages of crew per minute for overtime $ .11193

Cars handled by Terminal during 1938 on entire system	
Jan.	289,791
Feb.	250,391
Mar.	267,798
Apr.	242,820
May	249,220
June	240,391
July	253,095
Aug.	253,776
Sept.	248,527
Oct.	275,868
Nov.	271,764
Dec.	276,200
Total	3,119,641
Av. per week	59,993

Cars handled by Terminal January 8-14 inclusive 1939 on entire system	
Jan. 8	9,011
" 9	7,989
" 10	9,435
" 11	9,502
" 12	10,036
" 13	9,402
" 14	9,650
Total	64,935

Development of Volume Factor

$$\text{Average cars handled weekly 1938} = \frac{3119441}{52} = 59,993$$

$$\text{Volume factor} = \frac{\text{Average cars handled weekly 1938}}{\text{cars handled January 8-14 inclusive 1939}}$$

$$= \frac{59993}{64955}$$

$$= .9236$$

Estimate of time involved annually in handling cabooses by applying volume factor.

Minimum time = 938 x 52 x .9236 = 45050 minutes

Actual time = 1332 x 52 x .9236 = 63972 "

Maximum time = 2081 x 52 x .9236 = 99945 "

Adjusting time involved as between straight time and overtime. Referring to Appendix 5 we find total payroll for switchmen in CD Yard for the month of February 1939 to be $17,349.85 including $589.77 as overtime.

$$\text{Overtime ratio} = \frac{589.77}{17349.85} = .034$$

[fol. 231] Developing formula and estimated annual crew wages for handling cabooses in connection with CD Yard.

X = number of minutes of straight time
Y = number of minutes of overtime
R = $.07462 average rate of straight time per minute
R' = $.11193 average rate of overtime per minute
T = Total annual crew wages for handling caboose

Applied to estimated annual minimum time.

$X + Y = 45050$

$.07462X + .11193T = T$

$.11193Y = T \times .034$

$\frac{.11193Y = 3.29205Y = T}{.034}$

Substituting for T.

$.07462X + .11193Y = 3.29205Y$

$.07462X - 3.18012Y = 0$

$.07462X + .07462Y = 3361.63$

$3.25474Y = 3361.63$

$Y = 1032.84$ minutes

$X = 44017.16$ minutes

$1032.84 \times .11193 = 115.60$

$44017.16 \times .07462 = 3284.56$

$3400.16 = T$

Check:

$\$3400.16 \times .034 = \$115.60 = R'Y$

As applied to actual time $T = \$4628.52$

As applied to estimated maximum time $T = \$7543.39$

Map issued by the State of Illinois, Department of Public Works and Buildings, Division of Highways, showing the CD Yard, Pennsylvania Yard, I. C. Yard, Mobile Yard and Southern Railroad Yard in the East St. Louis, Illinois, District.

[fol. 232]

Graph—A, showing movements made by First Shift Crew, General Delivery No. L. out of the C. D. Yard, showing delivery runs to Pennsylvania Yard and return

Graph—B, showing movements made by First Shift Crew, General Delivery No. 2, out of the C. D. Yard, showing delivery runs to Pennsylvania Yard, I. C. and L. & N. and return.

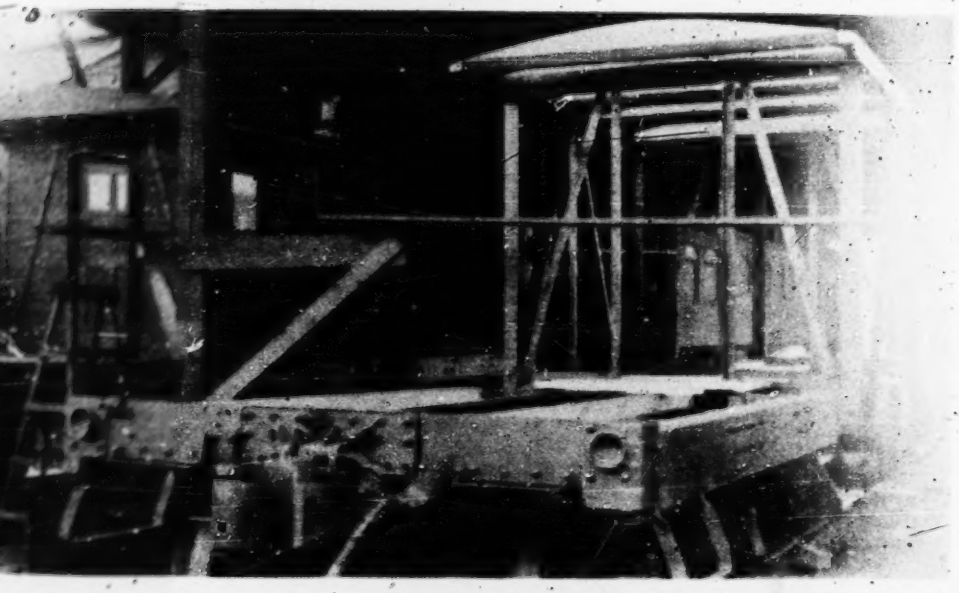
GRAPH—C, showing movements made by Second Shift Crew,
General Delivery No. 2, C. D. Yard to M. & O. Yard

Graph—D, showing movements made by First Shift Crew, General Delivery No. 3, from 8:30 A. M. to 12:00 Noon, Dec. 16, 1938.

Graph—E, Showing movements made by First Shift Crew, General Delivery No. 2, showing delivery run to M. & O. Yard and return.

Graph—F, showing movements made by Second Shift Crew, General Delivery No. 2, showing delivery to Southern Yard (Coapman) and return.

Photograph showing two shelter cabs under construction in C. D. Yard.



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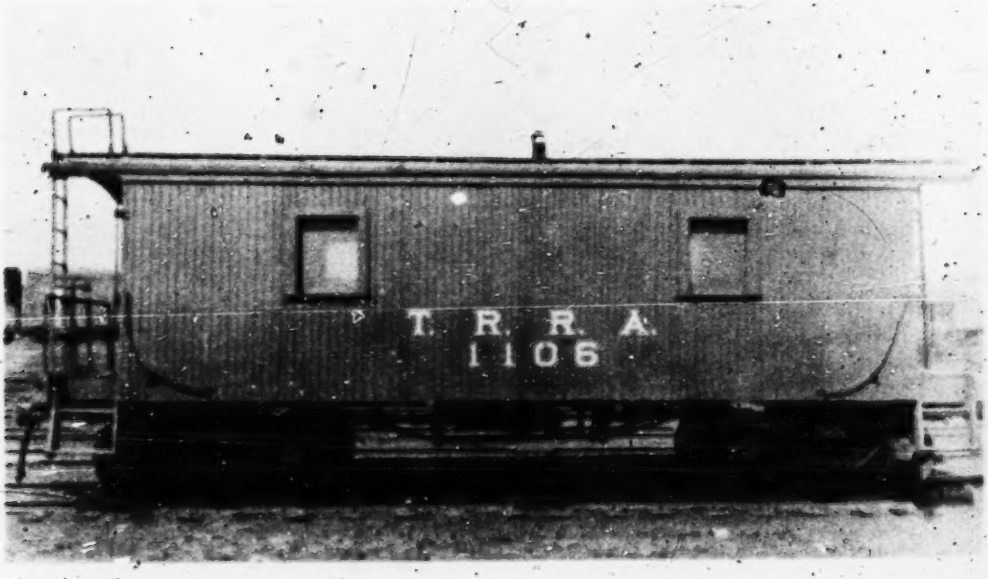
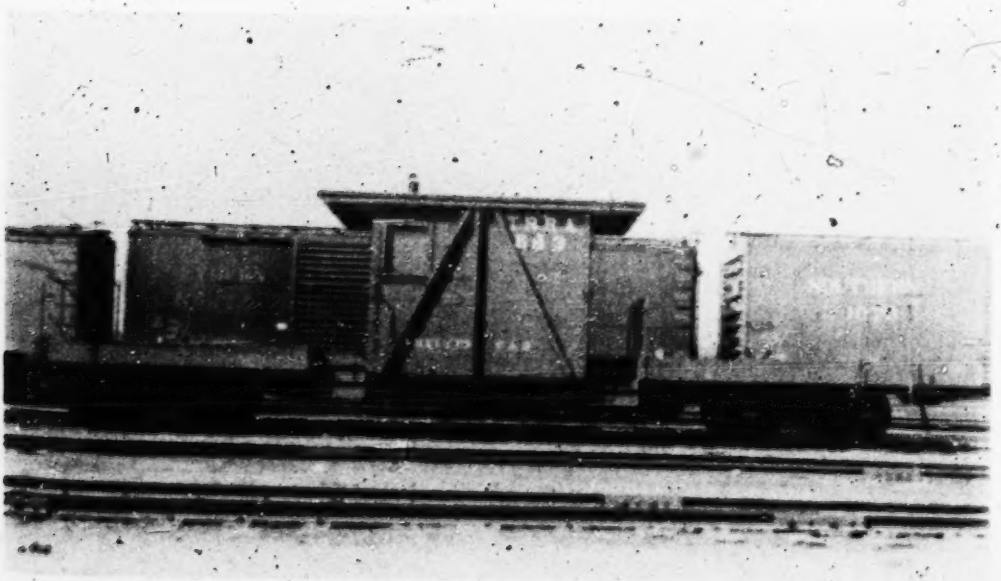
Photograph showing wooden underframe caboose.



Photograph showing side view of shelter cab 543 in No. 2 Yard East St. Louis.



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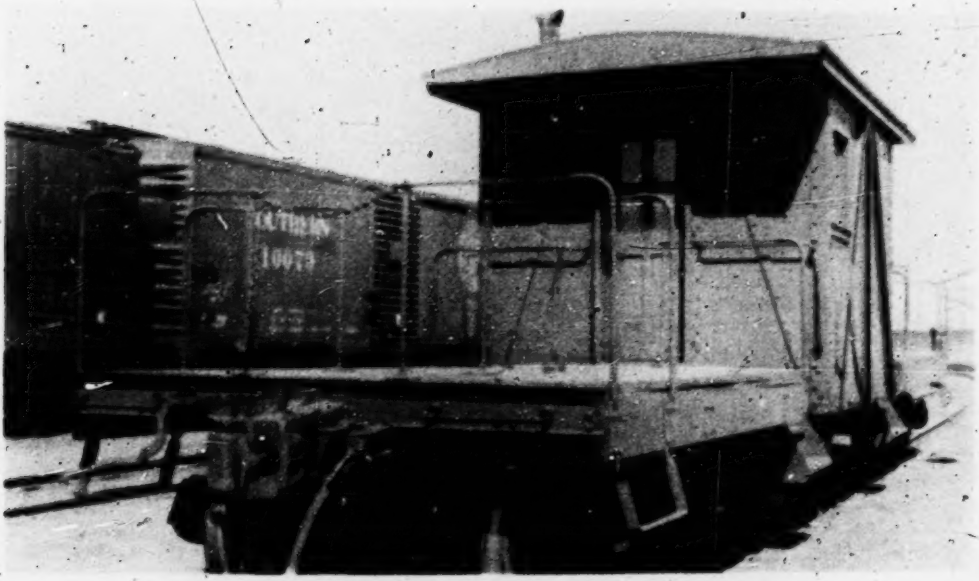
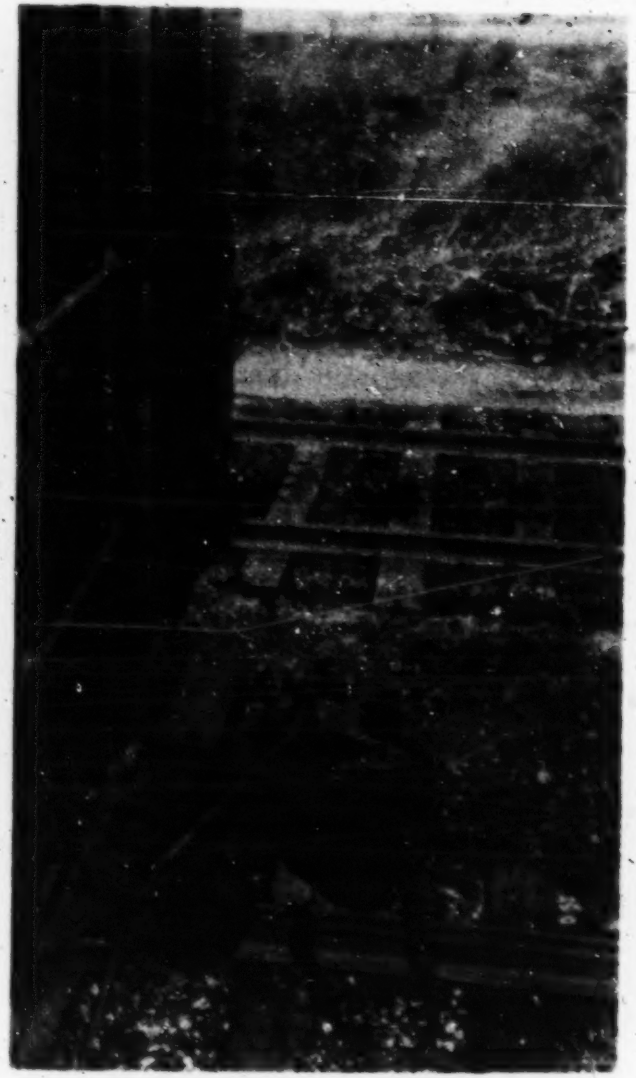
Photograph showing end view of Shelter Cab 543 in No. 2 Yard East St. Louis.



Photograph showing a Terminal switchman riding a Terminal delivery which is entering the Pennsylvania Yard.

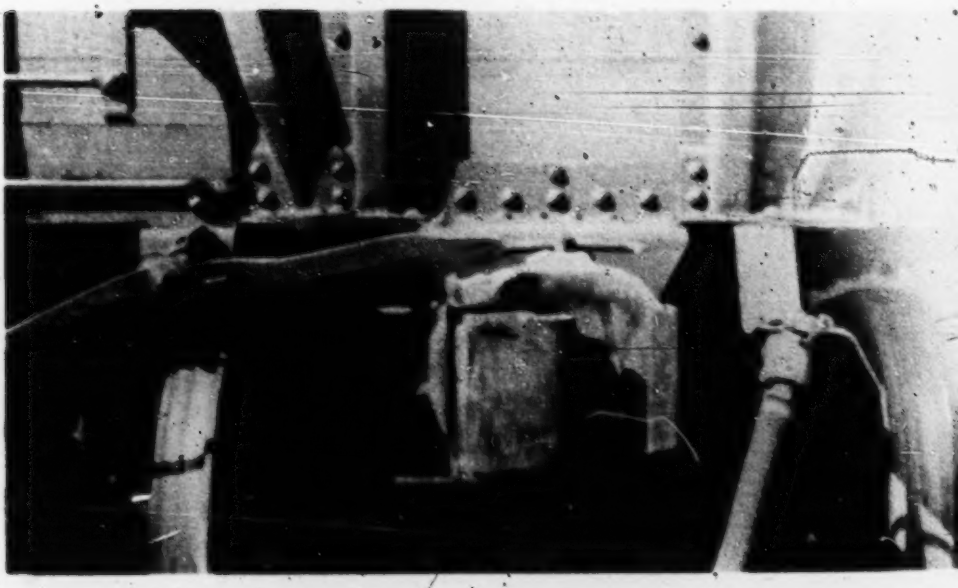
Photograph from the side showing details of usual position during transfer or delivery runs. (Car, not in train nor moving.)

Photographfrom the side showing details of drawbar and sill, etc.



177–178

Photograph showing details of same subject matter as above except from different angles.



[fol. 241] TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

General Offices

St. Louis

March 16, 1939.

H. D. Heuer, Auditor.

File CC-1206.

F. E. Sawyer, Freight Auditor.

Mr. J. H. Mathews, Chief Engineer, Illinois Commerce Commission, Springfield, Ill.

Attention, Mr. H. L. Butler

SIR:

In accordance with Mr. Butler's verbal request for information pertaining to the application of the Brotherhood of Railway Trainmen for additional cabooses in the State of Illinois, I show below the amount of overtime worked by switchmen during February, 1939, in the three yards situated in the State of Illinois and the cost of shelter cab #545.

Overtime worked, month of February, 1939

Location	Total Payroll	Total Overtime	Percent of Overtime
Madison yard, Madison, Ill.	$15,021.06	$2,484.42	16.54
No. 2 yard, East St. Louis	16,799.38	1,426.79	8.49
"CD" yard, East St. Louis	17,349.85	589.77	3.40
	49,170.29	4,500.98	9.15

Cost of flat car	$ 447.45
Cost of labor and material converting car into shelter cab	786.24
Total cost of converted car	1,233.69

Yours truly, H. D. Heuer, Auditor.

[fol. 242] COMMISSION'S EXHIBIT No. 2

Following the report dated March 20, 1931, the activities in Wiggins No. 2 Yard and Madison Yard have been investigated in the same manner as were those in C. D. Yard. This report is to be considered as a continuation of the

report of March 20, 1939, and to be read in connection with that report. It will be unnecessary therefore to repeat the general descriptive and historical matters set forth in the earlier report and since in general the layout, use and operation of the yards now under investigation are similar to the CD Yard, some of the matters previously stated with respect to the CD Yard apply substantially to the Wiggins No. 2 Yard and the Madison Yard.

Specifically the paragraphs headed "Methods Employed to Secure Information and Data," "Shelter Cabs," "Flagging Equipment," "Position of Rear Switchman," "Safety" and "Comfort" apply substantially to Wiggins No. 2 and Madison Yard.

In general the layout, use and the operations of these two yards are similar to CD Yard.

Plans of Madison Yard and Wiggins Yard No. 2, drawn to scale, are in evidence showing track arrangement and other physical features and details and for that reason description here is deemed unnecessary.

Cabooses are furnished between Madison Yard and Dupo, and on the Industrial Run the year around, while between Madison and the A & S, the IC and Valley Jct. cabooses are furnished from October 15th to May 1st.

Cabooses are furnished between Wiggins No. 2 Yard and Falling Springs the year around, while between Wiggins [fol. 243] No. 2 Yard and Dupo cabooses are furnished from October 15th to May 1st.

No other deliveries or transfers out of Madison Yard or Wiggins No. 2 Yard terminating in Illinois are furnished with cabooses.

This report covers deliveries or transfers originating and terminating within Illinois. No investigation was made with reference to trans-Mississippi operations.

The transfers originating in each of these yards and treated in this report are listed in the estimate of caboose handling time.

Since this report is a continuation of the request of March 20, 1931, the page numbering follows consecutively.

Distances to Yards

Madison Yard (from center)

	Miles
To CD Yard (to center)	2.5
Wabash East (to north end)	1.7
Granite City East (to Reilly Tar)	4
Granite City West (to Midland Tie)	2.9
Penna. (to center)	4.2
Nickel Plate and L&M (to west end)	1.8
A&S (to center)	6.3
Cotton Belt (to west end)	6.7
National Stock Yards (to west end)	1.5
O'Fallon (to O'Fallon Xing)	4
B&E (to Ridge Avenue)	4.7
Valley Jct. (To IC Xing)	6.6

Wiggins No. 2 Yard (from center)

	Miles
To IC (6th Street)	2.6
Cotton Belt (to west end)	4.9
Monsanto	3.4
Cahokia	2.9
Madison (to center)	2.2

The above distances were scaled from maps having a scale as small as ¼ inch to 1000 feet. However, these distances are reasonably correct and will give an idea as to the distance traveled by the delivery.

[fol. 244]

Deliveries Outbound Madison Yard by Terminal
May 14th to 20th, 1939, Inclusive

	CD Yd.	Wab. E.	Gran. City E.	Gran. City W.	Gran. City Comb.	Penna	Nickel Plate L&M	A&S and Cot. Belt	Nstl. Stk. Yds.	IC.	OF B&E	Valley Jct. Stk.	
May 14	6	4	0	0	0	1	3	3	1	1	1	3	
15	7	2	1	1	1	2	4	1	1	0	0	0	
16	9	3	1	1	1	2	2	2	1	2	1	1	
17	8	3	1	1	1	2	3	2	0	0	1	1	
18	7	5	1	1	1	2	3	2	1	2	1	1	
19	9	3	1	1	1	1	5	3	1	1	0	1	
20	8	2	1	1	1	2	4	3	0	1	0	1	
TOTALS	54	22	6	6	6	12	24	16	5	7	3	8	*-165
												2	

* Information indicates that the Industrial Run picks up the stock at Valley Junction about one-half of the time.

[fol. 245] Deliveries Outbound Wiggins #2 Yard by Terminal May 14th to 20th, 1939, Inclusive

	Dupo MP	IC 6th St.	Cotton Belt	Monsanto	Phillips	Cahokia	Madison
May 14	6	2	2	0	0	0	1
15	3	1	2	1	2	1	2
16	4	4	3	1	2	1	3
17	4	3	3	1	2	1	2
18	4	1	4	1	2	1	2
19	4	2	3	1	2	1	3
20	5	2	2	0	2	1	1
TOTALS	30	15	20	5	12	6	14 102

[fol. 246] Madison Yard

Estimate of Time Involved in Handling Cabooses May 14-20, 1939

Yard	Moves		Minimum	Actual	Maximum
Madison	165 @ 5 minutes		825		
	165 @ 9	"		1485	
	165 @ 36	"			5940
CD	54 @ 4	"	216		
	54 @ 6	"		324	
	54 @ 14	"			756
Wab. East	22 @ 2	"	44		
	22 @ 4	"		88	
	22 @ 8	"			176
Gran. City East	6 @ 5	"	30		
	6 @ 7	"		42	
	6 @ 14	"			84
Gran. City West	6 @ 3	"	18		
	6 @ 8	"		48	
	6 @ 16	"			96
Gran. City Comb.	6 @ 4	"	24		
	6 @ 8	"		48	
	6 @ 15	"			90
Penn.	9 @ 3	"	27		
	3 @ 17	"	51		
	9 @ 4	"		36	
	3 @ 17	"		51	
	9 @ 6	"			54
	3 @ 40	"			120
Nickel Plate	24 @ 4	"	96		
and	24 @ 11	"		264	
I&M	24 @ 15	"			360
*A&S	16 @ 4	"	64		
Cotton Belt	16 @ 8	"		128	
	16 @ 15	"			240
Natl	5 @ 2 Minutes		10		
Stk. Yds.	5 @ 3 Minutes			15	
	5 @ 5	"			25
*IC	7 @ 2	"	14		
	7 @ 6	"		42	
	7 @ 25	"			175
O.F.	3 @ 3	"	9		
B&E	3 @ 4	"		12	
	3 @ 8	"			24
*Valley	4 @ 2	"	8		
Jct.	4 @ 4	"		16	
	4 @ 6	"			24
			1436	2599	8164

* Cabooses furnished on these deliveries between October 15th and May 1st (28 weeks).

[fol. 247] Wiggins No. 2 Yard

Estimate of Time Involved in Handling Cabooses May 14-20, 1939.

Yard	Moves	Minimum	Actual	Maximum
Wiggins	102 @ 6 minutes	612		
	102 @ 8 "		816	
	102 @ 24 "			2448
Madison	14 @ 5 "	70		
	14 @ 8 "		112	
	14 @ 36 "			504
Dupo	30 @ 5 "	150		
*MP	30 @ 22 "		660	
	30 @ 30 "			900
IC	15 @ 1 "	15		
6th St.	15 @ 2 "		30	
	15 @ 5 "			75
Cotton Belt	30 @ 3 "	60		
	20 @ 4 "		80	
	20 @ 9 "			180
Monsanto	5 @ 2 "	10		
	5 @ 3 "		15	
	5 @ 3 "			25
Phillips	12 @ 2 "	24		
	12 @ 3 "		36	
	12 @ 5 "			60
Cahokia	6 @ 3 "	18		
	6 @ 6 "		36	
	6 @ 9 "			54
		959	1785	4246

* Cabooses furnished on these deliveries between October 15th and May 1st (28 weeks).

[fol. 248] Estimate of Annual Caboose Handling Time in Minutes

Madison Yard

Minimum

24 x 1436	=	34464
28 x (1436—(16 x 4)—(7 x 2)—(4 x 2)—27 x 5))		
28 x 1215	=	34020
		68484

Actual

24 x 2599	=	62376
28 x (2599—(16 x 8)—(7 x 6)—(4 x 4)—(27 x 9))		
28 x 2170	=	
		607 60
		123136

Maximum

24 x 8164	=	195936
28 x (8164—(16 x 15)—(7 x 25)—(4 x 6)—(27 x 36))		
28 x 6753	=	189084
		385020

Wiggins No. 2 Yard

Minimum

24 x 959	=	23016
28 x (959—30 (5 + 6))	=	17612
		40628

Actual

24 x 1785	=	42840
28 x (1785—30 (8 + 22))	=	24780
		67620

Maximum

24 x 4246	=	101904
28 x (4246—30 (24 + 30))	=	73528

[fol. 249]

Cars handled by Terminal during 1938 on entire system		Cars handled by Terminal May 14–20 inclusive 1939 on entire system	
Jan.	289,791	May 14	8,152
Feb.	250,391	" 15	7,676
Mar.	267,798	" 16	8,782
Apr.	242,820	" 17	8,618
May	249,220	" 18	9,282
June	240,391	" 19	9,330
July	253,095	" 20	9,324
Aug.	253,776		
Sept.	248,527	Total	61,164
Oct.	275,868		
Nov.	271,764		
Dec.	276,200		
Total	3,119,641		
Av. per week	59,993		

Development of Volume Factor
Madison Yard and Wiggins No. 2 Yard

Average cars handled weekly 1938 $= \frac{3,119,641}{52} = 59,993$

Volume factor $= \frac{\text{Average cars handled 1938}}{\text{cars handled May 14–20 inclusive 1939}}$

$= \frac{59993}{61164}$

$= .9809$

Development overtime factor Madison Yard

Total payroll Feb. 1939 = 15,021 06
Overtime " " " = 2,484 42

12,536 64

Overtime payroll reduced to straight time payroll $2 \times 2484\ 42 \div 3 = 1656\ 28$

Ratio overtime to straight time payroll $= \frac{15021\ 06}{1656\ 28 + 12536\ 65} = 1.0583$

Overtime factor Wiggins No. 2 Yard developed in same manner $= 1.0291$

Combined Overtime and Volume Factors

Madison Yard $= .9809 \times 1.0583 = 1.038$
Wiggins No. 2 Yard $= .9809 \times 1.0291 = 1.01$

[fol. 250] Estimated Annual Crew Wages for Handling Cabooses

Formula = Estimated annual minutes x cost per minute x combined overtime and volume factors.

Note: Cost per minute refer to page 19.

Madison Yard

Minimum

68,484 x $.07462 x 1.038 = $5304.47

Actual

123,136 x $.07462 x 1.038 = $9537.57

Maximum

385,020 x $.07462 x 1.038 = $29,821.94.

Wiggins No. 2 Yard

Minimum

40,628 x $.07462 x 1.01 = $3092.29

Actual

67,620 x $.07462 x 1.01 = $5146.72

Maximum

175,432 x $.07462 x 1.01 = $13221.64

It is estimated that the total annual Railway operating expenses for cabooses will be approximately two and a quarter times the estimated annual crew wages for handling cabooses.

If cabooses were made available it is estimated fifteen additional cabooses would provide the facilities for delivery runs out of Madison Yard and Wiggins No. 2 Yard as treated by this report.

[fol. 251] Commission's Exhibit No. 3

This report is a continuation of the reports previously submitted under the dates of March 20 and August 28, 1939, and covers the transfer runs made within the confines of the State of Illinois on the Terminal Railroad Association of St. Louis between St. Louis, Mo. and its three yards in Illinois, viz., C. D., Wiggins No. 2 and Madison. The investigation has ~~been~~ completed and this is the concluding report.

Information, data and the like with reference to the subject matter was gathered in the same fashion as heretofore except none of the runs or transfers were ridden.

Transfers between St. Louis, Mo. and C. D. Yard in Illinois move over the Eads Bridge across the Mississippi River, while transfers between St. Louis, Mo. and Madison and Wiggins No. 2 Yards in Illinois, move over the Merchants Bridge. The location of Eads Bridge is shown on a plan in evidence and the Merchants Bridge spans the river at a point about 3.3 miles upstream or to the north.

The operations in the yards and the routes used by the transfers were viewed and studied. Some of the equipment handled was noted and is set forth later in this report. Prevailing clearances were measured and diagrams developed from these measurements are also set forth herein.

Cabooses are furnished on the transfers originating in Wiggins No. 2 Yard and moving over the Merchants Bridge between October 15th and May 1st. No other transfers out of Madison Yard or C. D. moving over either bridge in Illinois are furnished with cabooses, except in some in- [fol. 252] stances, when transfers are made via Merchants Bridge and C. D. Yard.

The transfers operate into and out of the three yards above mentioned over the Eads and Merchants Bridge in Illinois, and treated in this report are listed in the estimate of caboose handling time.

Photographs, with appropriate explanatory notes, showing the physical features and surroundings as well as transfers enroute on each of the bridges in Illinois, are to be found later in this report.

Since this report is a continuation of the report of August 28, 1939, the page numbering follows consecutively.

Distance Transfers Operate in Illinois from Yards to Center of Mississippi River

Center C. D. Yard to Illinois line via Eads Bridge	1.4 miles
Center Madison Yard to Illinois line via Merchants Bridge	1.9 miles
Center Wiggins No. 2 Yard to Illinois line via Merchants Bridge	4.1 miles

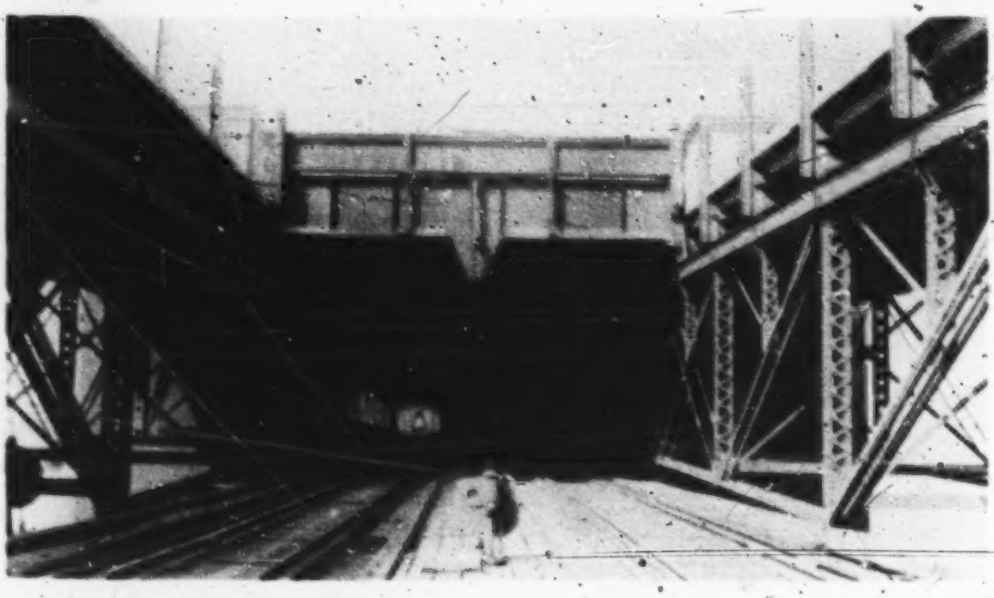
The above distances were scaled from maps having a scale of three-fourths inch to 1,000 feet. However, these distances are reasonably correct and will give an idea as to the distances traveled by the transfers in Illinois.

[fol. 253] Dimensions of Equipment Observed Moving Over Eads or Merchants Bridge in Illinois

Bridge	Direction	Kind of Car	Handled by Engine	Date 1939	Time	Car Number	Height from Rail To Top of Running Board	Extreme Width
Eads	W-B	Box	120	9/22	8:51AM	RI 157699	12' 10"	10' 1"
Eads	E-B	Auto	120	9/22	10:37AM	MP 78068	14' 8"	10' 10"
Eads	E-B	Box	120	9/22	10:37AM	Sou 306625	14' 6"	10' 8"
Eads	E-B	Auto	120	9/22	10:37AM	D&RGW 61243	14' 8-3/8"	
Eads	E-B	Box	120	9/22	10:37AM	Sou 13303	14' 6"	10' 8"
Eads	W-B	Auto	129	9/22	10:58AM	IC 162095	14' 10-13/16"	10' 3"
Eads	W-B	Box	129	9/22	10:58AM	Sou 10346	14' 6"	10' 8"
Eads	W-B	Box	129	9/22	10:58AM	NYC 97314	13' 1"	10' 3"
Eads	W-B	Auto	128	9/22	1:28PM	SL&SF 150428	14' 9"	10' 5"
Eads	W-B	Auto	128	9/22	1:28PM	NYC 48043	14' 6"	10' 8"
Eads	W-B	Refrig.	128	9/22	1:28PM	MDT 25869	13' 0"	10' —
Eads	W-B	Box	127	9/22	1:44PM	Sou 272754	15' 0"	10' 9"
Merchants	E-B	Auto	333	9/22	3:20PM	CB&Q 45941	14' 8"	
Merchants	E-B	Auto	333	9/22	3:20PM	L&N 46160	14' 10"	10' 6"
Merchants	E-B	Auto	333	9/22	3:20PM	Wab 48952	14' 11"	10' 5"
Merchants	E-B	Auto	325	9/22	3:58PM	MP 78127	14' 8"	10' 10"
Merchants	E-B	Auto	325	9/22	3:58PM	Milw. 13215	14' 10"	10' 7"
Merchants	E-B	Auto	321	9/22	4:06PM	Penn. 59740	14' 6"	10' 8"
Merchants	E-B	Box	321	9/22	4:06PM	NYC 51838	14' 6"	10' 8"

NOTE: Dimensions shown above were copied from the Official Railway Equipment Register Volume LV, No. 1 issued July 1, 1939, effective July 10, 1939.

Photograph (1) showing View West showing East portal of Eads Bridge. Camera located about West curb line of Front Street.



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Photograph (2) showing View East on Eads Bridge showing transfer which was moving on North Bridge track to C. D. Yard. Camera located about 100 feet West of Front Street.

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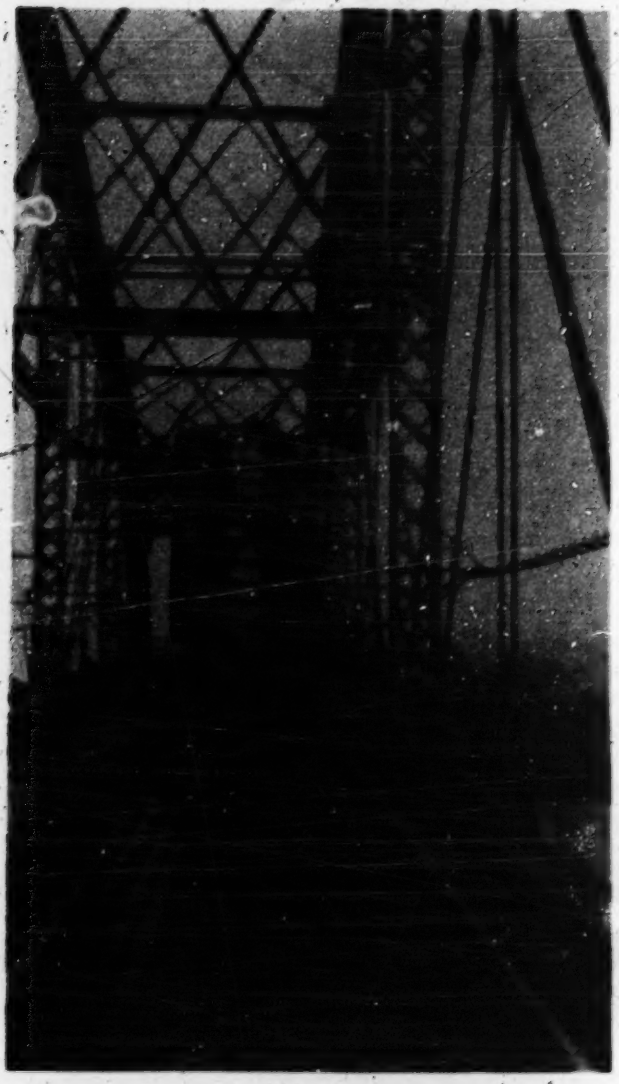
Photograph (3) showing View West along North track on Eads Bridge. Camera located about 250 feet West of Front Street.

Photograph (4) showing View East on Eads Bridge showing transfer which was moving on North Bridge track to C. D. Yard. Camera located about 100-feet West of Front Street.

Photograph (5) showing View West along South track on Eads Bridge showing transfer which was moving West from C. D. Yard. Camera located about 350 feet West of Front Street.

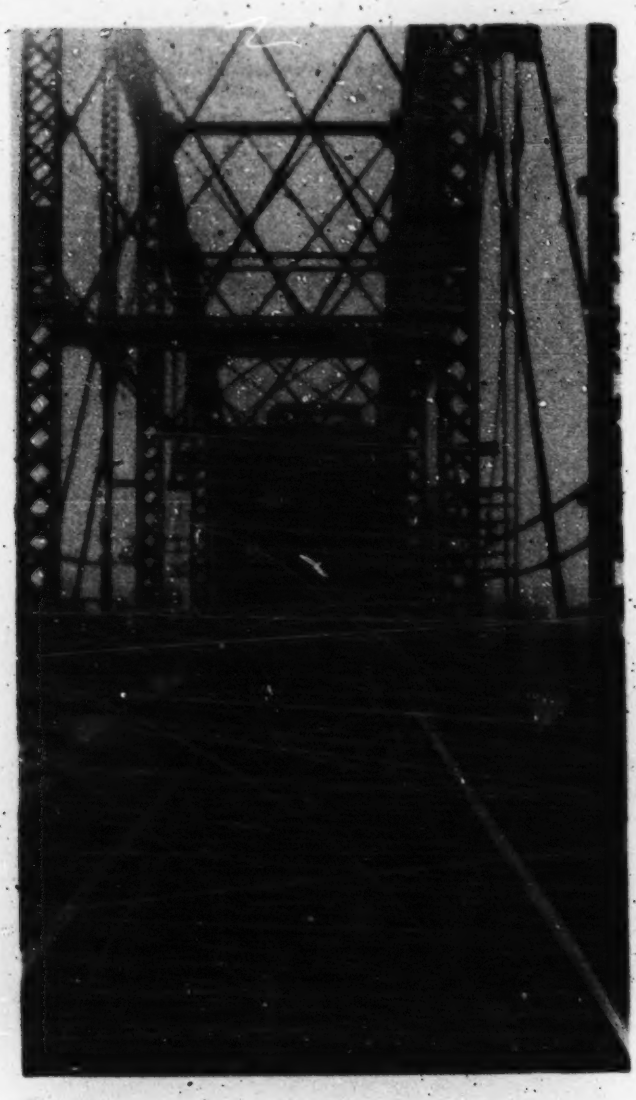
Photograph (6) showing View West showing the physical features, surroundings and track arrangement on the Merchants Bridge. Camera located at a point about 50 feet East of the Illinois shore line of Mississippi River.

Photograph (7) showing View East showing transfer moving East on Merchants Bridge. Camera located about 240 feet West of the Illinois shore line of Mississippi River.



Photograph (8) showing View East showing transfer moving East on Merchants Bridge. Camera located about 240 feet West of the Illinois shore line on Mississippi River.

Photograph (9) showing View West of Merchants Bridge showing transfer which was moving West. Camera located about 240 feet West of Illinois shore line of Mississippi River.



[fol. 263] Diagram showing horizontal distances of Sections on Eads Bridge. I. C. C.

Diagram showing Section at Point 1. Represents minimum lateral clearances between Points 1 & 2. I. C. C. Eads Bridge.

Diagram showing Section 63' West of Point 2, Eads Bridge. I. C. C.

Diagram showing typical section between points 5 and 6. I. C. C.

Diagram showing typical section between points 7 and 8. I. C. C. Eads Bridge.

Sketch showing consolidated minimum clearances, Eads Bridge. I. C. C.

Diagram of Section showing consolidated minimum clearances between East Shore Line and a point 528' West thereof. Merchants Bridge. I. C. C.

Number of Deliveries Using the Merchants or Eads Bridge Inbound or Outbound C. D. Yard, Wiggins No. 2 Yard or Madison Yard as Noted, September 10–16, Inclusive, 1939.

Date 1939	Eads Bridge—C.D. Yard	Merchants Bridge—Madison Yard	Merchants Bridge—Wiggins No. 2 Yard
September 10	19	15	3
" 11	21	10	3
" 12	23	12	3
" 13	21	13	4
" 14	20	15	3
" 15	22	13	3
" 16	25	15	4
Totals—	151	93	23

[fol. 264]

Cars handled by Terminal During 1938 on entire system

Jan.	289,791
Feb.	250,391
Mar.	267,798
April	242,820
May	249,220
June	240,391
July	253,095
Aug.	253,776
Sept.	248,527
Oct.	275,868
Nov.	271,764
Dec.	276,200
Total	3,119,641
Av. per week	59,993

Cars handled by Terminal September 10–16 inclusive, 1939, on entire system

Sept. 10	8,000
" 11	7,013
" 12	8,543
" 13	8,394
" 14	9,189
" 15	8,901
" 16	9,204
Total—	59,244

Estimate of Time Involved in Handling Cabooses September 10-16, 1930.

Yard	Moves	Minimum	Actual	Maximum
C. D.	151 @ 4 minutes	604		
	151 @ 8 "		1208	
	151 @ 12 "			1812
Madison	93 @ 5 "	465		
	93 @ 9 "		837	
	93 @ 36 "			3348
Wiggins No. 2*	23 @ 6 "	138		
	23 @ 8 "		184	
	23 @ 24 "			552

* Cabooses furnished on this delivery between October 15th and May 1st (28 weeks).

[fol. 265] ESTIMATE OF ANNUAL CABOOSE HANDLING TIME IN MINUTES

C. D. Yard—

		Minutes
Minimum	604 x 52 =	31,408
Actual	1208 x 52 =	62,816
Maximum	1812 x 52 =	94,224

Madison Yard—

Minimum	465 x 52 =	24,180
Actual	837 x 52 =	43,524
Maximum	3348 x 52 =	174,096

Wiggins No. 2 Yard—

Minimum	138 x 24 =	3,312
Actual	184 x 24 =	4,416
Maximum	552 x 24 =	13,248

ESTIMATED ANNUAL CREW WAGES FOR HANDLING CABOOSES

C. D. YARD

Minimum	31,408 x $.07462 =	$ 2,343.67
Actual	62,816 x .07462 =	4,687.33
Maximum	94,224 x .07462 =	7,031.00

MADISON YARD

Minimum	24,180 x $.07462 =	1,804.31
Actual	43,524 x .07462 =	3,247.76
Maximum	174,096 x .07462 =	12,991.04

WIGGINS NO. 2 YARD

Minimum	3,312	x $.07462	=	247.14
Actual	4,416	x .07462	=	329.52
Maximum	13,248	x .07462	=	988.57

If cabooses were made available it is estimated that 15 additional cabooses would provide the facilities for deliv- [fol. 266] ery runs covered by this report (pages 34-54).

Upon completion of the investigation of the entire Terminal Railroad Association operation within the State of Illinois with respect to providing caboose facilities, it appears that in some instances it would be practical and feasible to assign cabooses to certain transfers, while in other instances the operation is such that the pooling of cabooses would be more practical. Under these circumstances it appears that the manner in which the cabooses are operated, if and when required, is a question which should be left to the management of the railroad.

SUMMARY

Number of available cabooses estimated to provide facilities for transfers covered by the three sections of this report

Report	Caboose	Page
Mar. 20, 1939	6	Sheet 2 of summary of
Aug. 28, "	15	report of March 20, 1939.
Oct. 4, "	15	33
Total—	36	53

Estimated annual crew wages for handling cabooses (actual) covered by the three sections of this report

Report	Wages	Page
Mar. 20, 1939	$ 4,828.32	22
Aug. 28, "	14,684.29	23
Oct. 4, "	8,264.61	53
Total—	$27,77.22	

The figures on this page are a summary of figures set forth heretofore in the three sections of this report, on pages as above indicated.

[fol. 267] Respondent's Exhibit 1. Rules.
Respondent's Exhibit 2. Miscellaneous Rules.
Respondent's Exhibit 3. Excerpts from Book of Rules and Working Time-Table.
Respondent's Exhibit 4. Application for Employment.
Respondent's Exhibit 5. General Notice 376.
Respondent's Exhibit 6. General Notice 438.
Respondent's Exhibit 7. General Notice 461.
Respondent's Exhibit 8. General Notice.
Respondent's Exhibit 9. General Notice.
Respondent's Exhibit 10. Schedule, showing distances.
Respondent's Exhibit 11. Map of tracks, Madison Yard.
Respondent's Exhibit 12. Map of tracks, C. D. Yard.
Respondent's Exhibit 13. Map of tracks, No. 2 Yard to Eads Bridge.
Respondent's Exhibit 14. General Order No. 1942.
Respondent's Exhibit 15. Statement of Average Monthly Temperature.
Respondent's Exhibit 16. Statement of deliveries.
Respondent's Exhibit 17. Statement with reference to agreement with Bureau of Animal Industry.
Respondent's Exhibit 18. List of taxes paid.
Respondent's Exhibit 20. Statement of Revenue cars handled.
[fol. 268] Respondent's Exhibit 21. Graph showing Revenue cars.
Respondent's Exhibit 22. Income statement.
Respondent's Exhibit 23. Consolidated Comparative Income Statement.
Respondent's Exhibit 24. Consolidated general balance sheet.
Respondent's Exhibit 25. Income Statement.
Respondent's Exhibit 26. Statement of taxable income.
Respondent's Exhibit 27. Annual Report.
Respondent's Exhibit 28. Temperature Readings.
Respondent's Exhibit 29. Temperature—1933.
Respondent's Exhibit 30. Annual Meteorological Summary, 1932.
Respondent's Exhibit 31. Annual Meteorological Summary, 1934.
Respondent's Exhibit 32. Annual Meteorological Summary, 1935.
Respondent's Exhibit 33. Annual Meteorological Summary, 1936.

Respondent's Exhibit 34. Annual Meteorological Summary, 1937.

Respondent's Exhibit 35. Memorandum of Understanding between Terminal Railroad and Bureau of Animal Industry.

Respondent's Exhibit 36. Statement showing movements into and out of C. D. Yard.

Respondent's Exhibit 37. Statement of movements to heaviest connections.

Respondent's Exhibit 38. Service Buildings and other structures.

[fol. 269] Respondent's Exhibit 39. Station Map, Pennsylvania System.

Certificate dated April 16, 1940, of Joseph E. Knight, Secretary of Illinois Commerce Commission, to record.

ORDER OF CIRCUIT COURT—Filed July 27, 1940

Now, on this 26th day of July, A. D. 1940, being one of the judicial days of this Court, and being the day previously set by this Court for the hearing of the above entitled cause, comes Terminal Railroad Association of St. Louis, appellant in the above entitled cause, by Kramer, Campbell, Costello & Wieckert, its attorneys (Bruce A. Campbell of said firm appearing in Court); and also comes Brotherhood of Railroad Trainmen, Richard Abram, Chairman and State Legislative Representative, by A. Schwarzbach, its attorney; and also comes Illinois Commerce Commission, by its attorney, Harry R. Booth, Assistant Attorney General of the State of Illinois. And all of said parties announce that they are ready to proceed with the hearing of the above entitled cause.

Whereupon this cause comes on to be heard upon a certified copy of the order and decision of the Illinois Commerce Commission rendered hereir, and upon the record of said cause, certified to this Court by the said Commission.

And the Court having heard arguments of counsel for the respective parties, and not being fully advised in the premises, said cause upon said appeal was taken under advisement by the Court.

JUDGMENT OF CIRCUIT COURT

And now, on this 7th day of January, A. D. 1941, being one of the judicial days of said Court, and the Court being

fully advised in the premises, is of the opinion that that [fol. 270] portion of the order of the said Illinois Commerce Commission requiring cabooses to be attached to trains moving between the States of Illinois and Missouri over the Eads Bridge and Merchants Bridge is an interference with interstate commerce and is beyond the jurisdiction of the Illinois Commerce Commission.

Under the decision rendered in the case of Brotherhood of Railroad Trainmen *vs.* Elgin & Eastern Ry., 374 Ill. 60, the power of the Circuit Court is limited to either affirming in its entirety or setting aside in its entirety the order of said Commission. Hence, said order must necessarily be set aside.

It is, Therefore, Ordered, Adjudged and Decreed by the Court that the said order and decision of the said Illinois Commerce Commission in the above entitled cause be and the same is hereby reversed and set aside.

It is further Ordered and Adjudged that the suspending bond executed by said defendant, as principal, and Massachusetts Bonding and Insurance Company, as surety, be released and discharged and of no further force and effect.

"NOTICE OF APPEAL

To: Messrs. Kramer, Campbell, Costello & Wiechert, Attorneys for Terminal Railroad Association of St. Louis, 606 First National Bank Bldg., East St. Louis, Illinois. Defendant-Appellee,

PLEASE TAKE NOTICE that BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legisla- [fol. 271] tive Representative, and ILLINOIS COMMERCE COMMISSION, plaintiffs in the above entitled cause, do hereby appeal to the Supreme Court of Illinois from the judgment entered in this cause in the Circuit Court of St. Clair County, Illinois, on or about the 7th day of January, A. D. 1941, reversing and setting aside the order and decision of the Illinois Commerce Commission dated February 1, A. D. 1940.

Plaintiffs-Appellants pray that the said order and judgment of the Circuit Court of St. Clair County, Illinois, be reversed, set aside and held for naught and that the

order of the Illinois Commerce Commission dated February 1, A. D. 1940, be in all respects affirmed and sustained.

Filed Mar. 4, 1941. Charles G. Becker, Circuit Clerk.

George F. Barrett, Attorney General of Illinois, and Albert J. Meserow, Assistant Attorney General of Illinois, as Attorneys for the Illinois Commerce Commission, Plaintiff-Appellant; A. A. Schwarzbach and A. E. Stein, Attorneys for Brotherhood of Railroad Trainmen, Richard Abram, Chairman man and State Legislative Representative, Plaintiffs-Appellants.

Stipulation, between the parties hereto, through their respective attorneys, that the original certified transcript of [fols. 272-277] proceedings had before the Illinois Commerce Commission and of the orders of said Commission, as filed in the Circuit Court of St. Clair County in the above entitled cause, together with all original exhibits offered or received in evidence before the said Illinois Commerce Commission in said cause, be incorporated in the record on appeal to the Supreme Court of Illinois, in lieu of copies thereof.

Proof of Service of notice of appeal on Messrs. Kramer, Campbell, Costello & Wiechert, Attorneys for Terminal Railroad Association of St. Louis, defendant-appellee, filed March 4th, 1941.

Praecipe for complete Record and Proof of Service thereof, filed March 11, 1941.

Certificate of Clerk of Circuit Court of St. Clair County, under seal of said Court, certifying that the above and foregoing is a true, full, perfect and complete copy of the record (except Item 3 specified in Praecipe, the original of which item is included herein, as per stipulation filed herein).

Respectfully submitted, GEORGE F. BARRETT, Attorney General of the State of Illinois, Attorney for Illinois Commerce Commission, *Plaintiff, Appellant.* A. A. SCHWARZBACH and ALVIN E. STEIN, Attorneys for Brotherhood of Railroad Trainmen, Richard Abram, Chairman and State Legislative Representative, *Plaintiff-Appellants.*

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[fol. 278] In Supreme Court of Illinois

No. 26,261

November Term, A. D. 1941

Brotherhood of Railroad Trainmen, Richard Abram, Chairman and State Legislative Representative, and Illinois Commerce Commission, Plaintiffs-Appellants,

vs.

Terminal Railroad Association of St. Louis, Defendant-Appellee

Appeal from Circuit Court, St. Clair County

Honorable D. H. Mudge, Trial Judge

Additional Abstract of Record—Filed October 4, 1941

Letter of transmittal from Illinois Commerce Commission shows, in addition to the matters set forth in the abstract, that notice of appeal was filed with the Commission on March 25, 1940.

Motion re Specifications of Basis of Complaint

Motion by respondent that petitioner be required to file, within a time to be fixed by the Commission, specifications of what the complaint is based on, and what relief it desires, and stating that there is no prayer for relief in the petition and there is no statement of the various reasons upon which it is alleged there is lack of safety.

[fol. 279] In support of motion, respondent states that it is unable to defend until it is provided just what reasons the complaint relates to; calling attention to the fact that the complaint merely says: "failed to provide caboose cars in the territory in and about East St. Louis." Calling attention to the fact that there are a lot of transfer runs in that vicinity and that there ought to be a specific statement of the different reasons and statements made in the petition specifically as to what is desired as to each of them. Statement by counsel for petitioner in reply to an interrogatory of Examiner that it would stand on the complaint. Statement by counsel for respondent that it desires to save the point in the record that the complaint is not sufficient

in law to proceed upon. Statement by Examiner Daley that the ruling would be that the motion would be taken under advisement and held in abeyance.

STATEMENT BY COUNSEL FOR PETITIONER

Statement by counsel for petitioner, calling attention to the Illinois Constitution, Article I, defining the boundaries of the State of Illinois and asking that the Examiners take judicial notice of the boundaries under the Constitution.

SPECIFIC OBJECTION MADE BY RESPONDENT AS FOLLOWS:

Mr. Campbell: Now, just a minute on the Eads Bridge; we want to make a specific objection; I think it raises the whole point of this case right here, so far as the law is concerned. Section 20, Illinois Commerce Commission Act, provides as follows: "Neither this act nor any provision thereof shall be construed to apply to commerce of foreign nations or commerce among the several states of this na- [fol. 280] tion, except when specifically so stated and insofar as the same may be permitted under the provisions of the Constitution of the United States or acts of Congress and the decisions of the Supreme Court of the United States." Under that statute this Commission has been held by the Supreme Court of this state, as a body of limited jurisdiction, possessing only such jurisdiction as is specifically granted to it by the act. The act expressly excludes the application of the act to interstate Commerce, using the words "commerce among the several states of the nation," except where specific jurisdiction shall be given in the act over such interstate commerce. There is no specific jurisdiction given by the Act to regulate any movements or transaction in interstate commerce or to make orders relating to the health, safety and so forth of employees.

Examiner Nyka: The objection will be sustained.

Mr. Schwarzbach: At the very beginning I asked the Commission to take judicial notice of the Constitution of the State of Illinois and the very purpose of that was to counteract this particular objection. Section 20, as Mr. Campbell read, it is correct, as far as the reading is concerned, but does not cover our case among the several states. The testimony of the witness will only cover that part of the bridge in the State of Illinois, and you under-

stand that, Mr. Witness, consequently I think Mr. Campbell's objections are entirely out of line.

Mr. Campbell: Well, that would be regulating interstate commerce, too, and this Commission would have no jurisdiction to enter any order covering the movement from one state to another, which it would be, across the Eads Bridge and the Merchants Bridge.

[fol. 281] Mr. Schwarzbach: I am not asking for any movement into Missouri at all; the movement was only to the Illinois side of this particular bridge.

Mr. Campbell: I think, if the Examiners please, we have reached a point in this case, not only as to this point, but I also expect to raise the same point as to any cuts containing interstate commerce, that is commerce among the various states. I think we have reached a legal question which should be decided before we proceed any further.

Examiner Daley: Let's get off the record for a time and see what we can do.

(Whereupon a discussion was had out of the record.)

Examiner Nyka: In view of the fact that we cannot reach any agreement, we might as well go ahead and then we will rule at the proper time.

Mr. Schwarzbach: For the purpose of the record, Mr. Examiner please, I would like to call your attention to paragraph 51 on pages 42, 43 and 44 which specifically gives this Commission jurisdiction to handle, fix and establish switching rules and regulations and so forth, and our case comes specifically within that paragraph. Will you go ahead now, Mr. Jenkins?

Mr. Campbell: Well, now, for the record, I want to make this specific objection as to the two bridges, and I also want to raise the question that this Commission has no jurisdiction over any of the movements that contain cars being transported in interstate commerce, even though the movements be within the State of Illinois. I want to get that clear in the record, because I do not want to delay matters [fol. 282] by objecting all the time. I want my views in both instances in the record.

Examiner Daley: They will probably come up from time to time, and they will be sufficiently clarified as we go along.

Mr. Abram: You want it understood that there is a general objection all the way through.

Mr. Campbell: Yes.

Mr. Abram: All right.

Mr. Campbell: I want it clearly understood that I am making the two distinctions, one as to the actual movement over the bridges and the other as to movement from one point in Illinois to another point in Illinois, but containing cars being transported in interstate commerce.

Mr. Schwarzbach: We have no objection — that general objection.

Examiner Nyka: All right.

CHARLES J. JENKINS, Direct examination:

Q. In your opinion, would it be possible to put crossovers on these bridges in the State of Illinois?

Mr. Campbell: I object to that; there couldn't be any duty, in addition to the other objections, to taking a caboose to the middle of the river and then put it over on another main track and leave it there to obstruct traffic while they went over to St. Louis and back or vice versa.

Examiner Nyka: What was the question?

(Question read.)

Mr. Schwarzbach: I might say, in answer to Mr. Camp- [fol. 283] bell, if the Commission finds that this endangers the lives of these switchmen or some of the employes, they certainly would have a right to order the railroad to put these crossovers there if they find it necessary. I think it is entirely within the province of the Commission.

Mr. Abram: In that event a caboose could be switched within the boundaries of Illinois and it would not necessarily have to go across the river. It would provide railroad facilities for cutting off the caboose and confining it strictly to the Illinois boundary line.

Examiner Nyka: He may answer. Objection overruled.

CHARLES J. JENKINS, Cross-examination:

It would be up to the railroad to put the caboose; they have many crews in their yards and the managerial system would be worked out and there wouldn't be any delay. I cannot testify to what the railroad officials would do with

reference to managing the railroad. In answer to question as to whether it would cause considerable extra expense for the time of the men to make the movements and set the caboose to the proper place and couple it onto the cut and take it off when they got to the end of the run, the witness stated he would answer that by saying all the other railroads in the St. Louis territory do that.

LESLIE W. CHEATHAM, Direct examination:

Mr. Campbell: I now move to exclude all of these answers as to other railroads for the reasons they are immaterial, [fol. 284] irrelevant, and for the further reason that even if competent and relevant and material, there is no evidence showing similar conditions, and he cannot have a basis for any comparison.

Mr. Schwarzbach: I was going to ask the witness another question.

Mr. Nyka: There is an objection here that will have to be disposed of. The Commission will take notice of the operations of the other railroads. There might be a similarity, and since we are a fact-finding body, we will take the evidence for what it is worth.

LESLIE W. CHEATHAM, Cross-examination:

The air is not coupled up on these runs, and if the air is not coupled up it would not make any difference as to elimination of hazard by having a caboose with a tail hose on it. In order to make a caboose available for the elimination of hazards, as I have mentioned, you would have to have it coupled up. I would say that, so far as the air is concerned, as to all of these runs. The usual time for the Rose Lake run is fifteen or twenty minutes, but I have seen it take an hour.

WILLIAM O. SATTERFIELD, Cross-examination:

In counting my distance from CD to Southern tracks, I count where my train is made up and where I climb on the hind end of it, which is on the north end of the eastbound yard on track 29. I count to the point where I get off. Lin-

ing across over the main line switch, back in there on the [fol. 285] in and outbound Southern line, and my cut is not reported until I have a receipt and start back. I may be fifteen car lengths from where I pull in. We enter the first I. C. switch we come to, which governs the cars over between the southbound and northbound I. C. main line. There are a number of tracks leading into the I. C. house track. We usually pull into track 1 or 2 in leaving cars on the I. C. tracks. We have switch tenders take care of switches. We have a bulletin on the board we must ride the hind end of the delivery between the yard shanty through the plant. We cannot get off at the last switch. I don't know how far it is from where the last switch is in leaving the CD yard to the first switch where you enter the Illinois Central tracks upon which we deliver. We do not deliver to the nearest point. I do not know whether it is a fact that the nearest points to the yards are 800 feet apart—I never measured it.

Objection repeated to any evidence as to what is done on other railroads as not binding on respondent or material as to what should or should not be done on the lines of respondent.

Agreement that this objection and other objections as to what is done on other railroads heretofore made should be considered as made to all similar kinds of testimony.

Objection to testimony of witness Bruce and motion to strike the evidence from the record on the grounds it is not proper subject for opinion or expert testimony; that it is asking an opinion upon an ultimate fact to be determined by the Commission and invades the province of the Commis- [fol. 286] sion as to the determination of the ultimate issues in this case.

Statement by counsel for respondent that, as he understands the law, the Commission is bound by the rules of evidence as laid down by the courts of the state. Statement by counsel for petitioner that, as a rule, that is true. Statement by counsel for respondent that one of the fundamental rules is that a witness cannot invade the province of a fact-finding body, the jury or Court or Board and express opinions upon the ultimate facts.

Further objection as to qualifications of witness as to what would be proper in East St. Louis and in that territory.

Ruling by Examiner overruling petitioner's objections.

JOHN A. WICKS, Direct examination:

The Terminal Railroad Association of St. Louis is engaged wholly as a switching carrier engaged in yard operations, and as to freight trains, they do not run on any regular schedule such as trunk line- run freight trains on. When I say "CD" yard, I include two or three or four yards that make up one major yard.

Q. Without attempting to detail them all, are there any yards on the west side of the river?

Mr. Schwarzbach: I object if it is outside the State of Illinois.

Mr. Campbell: This is just preliminary.

[fol. 287] Assistant Commissioner Nyka: We will have to sustain the objection. It is outside the territory of the state.

Mr. Campbell: I am just showing the general operations now.

Mr. Schwarzbach: I don't believe that is material here.

Mr. Campbell: Well, we offer to prove by this witness that there are four or five large yards of the Terminal Railroad Association on the west side of the river in Missouri, and that the general movements are between yards in Missouri and yards in Missouri, between yards in Missouri and yards in Illinois, and between yards in Illinois and yards in Illinois.

Assistant Commissioner Nyka: This Commission has no jurisdiction over the State of Missouri. Therefore, at the outset of this case, it was agreed there would be no evidence regarding what happens in Missouri.

Mr. Campbell: No, but I am offering it for the purpose of showing the general character of the railroad operations.

Mr. Schwarzbach: There was an objection, Mr. Campbell, to anything in Missouri. You raised your point and it was understood that anything at that side was subject to objection.

Mr. Campbell: That was on the jurisdiction of the Commission. I want to show the general operations.

Mr. Schwarzbach: I object.

Assistant Commissioner Nyka: Objection sustained.

If we got a train of, say, fifty cars from the Pennsylvania which were to be transferred to other railroads in East St. Louis or on the east side of the river, they would be taken

into our own yards because they would probably go to from [fol. 288] one to fifteen different lines; they would be taken into our classification on yard, broken up into deliveries and the cars for each line taken to those lines. For example, the cars that went to the Southern would be taken to it and the cars that went to the B. & O. would be taken to it. General Order 438 was issued June 25, 1930, and is in full force and effect at the present time. It is delivered to all switchmen working in the yards the same as any notice and receipted for by them. I see I made a misstatement when I said that General Order 438 was now in effect, because General Notice 461 supersedes General Notice 438 and is the one that is now in effect. General Notice 461 was delivered to all switchmen in the yards and receipted for by them. The general notice issued May 12, 1932, relative to movements to Rose Lake yard on the Pennsylvania covers the movements then installed between CD yard and the Pennsylvania inspection pit and was served on and receipted for by the switchmen in the yards. My testimony as to general notice covered by Exhibit 9, relative to movements between CD yard and Southern Railway yards and service of it upon the switchmen and receipted for by them, would be the same as to other general orders testified about.

Mr. Campbell: I want to make a statement for the record. Back in 1915, the respondent was flooded with prosecutions by the Government on account of violations of the twenty-eight and thirty-six hour law as construed by the courts, in that, for example, they were liable under it if they accepted a car they could not get to the stockyards in time, or if they accepted a car that the twenty-eight and thirty-six [fol. 289] hour limitation had already run on. According to law, of course, we had a right to refuse them, but that meant, with a refusal to the Illinois Central from the Southern, for example, the Illinois Central would have to take that car back to Carbondale to be unloaded. The Government wanted to enforce the humane provision of the act.

I went to Washington in 1915 and made an agreement with the Department of Agriculture that where the time was expired or was about to expire and the cars could not be gotten out to the stockyards in time, we might accept those cars without prosecution, provided we delivered them at the stockyards within a specified schedule from each delivery point, which was a mighty short time; and if we don't deliver within that time, we are under agreement to plead

guilty when the Government presses the prosecution—even though we would have a breakdown, we would really have only a couple of hours to get an engine in.

That agreement was renewed April 6, 1934, and with that in view, Mr. Wicks has prepared a statement. I realize, in order to prove it by legal testimony, I would have to go to a lot of trouble and bring witnesses maybe from Washington, and things of that sort.

I personally negotiated that agreement with the Assistant Secretary of Agriculture in January, 1915.

Mr. Schwarzbach: How would that be material to the issues?

Mr. Campbell: I am asking you if you will agree it may be stated that it is true, without proof. I am not asking you to agree as to its materiality.

In other words, may be offer it as Mr. Wicks' testimony without the objection that it is not the best evidence on [fol. 290] those points? I realize, when I look at it, there is one sentence you would not agree to, but I can prove that by witnesses.

Mr. Schwarzbach: You mean "The use of cabooses on these deliveries would slow up the handling to such an extent that we could not dispose of the stock within the specified time"?

Mr. Campbell: Yes. We will have to prove that by testimony.

Mr. Schwarzbach: Of course, I would be willing to take your word for what you say, Mr. Campbell, without any question. If you take that out——

Mr. Campbell: I will scratch that out. That will have to be proved by testimony.

Mark this "Exhibit 17."

(Which said document was marked "Respondent's Exhibit 17, #26601, 9-14-38," for identification.)

Mr. Schwarzbach: I say this: I will not object to the method Mr. Campbell is attempting to use to make his proof. I will not ask for the Government officials to testify, but I will object to Exhibit 17, even with that part stricken out, on the ground that it is not material to the issues.

Mr. Campbell: We will follow that up by testimony. It would not be material if it is not followed up by offering testimony as to delays caused by using cabooses on these

particular runs in Illinois. That would subject us to prosecution by the Government.

Mr. Schwarzbach: Under the law, the Terminal does not have to take these cars. They can disregard them if they can't deliver within the period specified by law.

Mr. Campbell: We are under agreement to the Govern-
[fol. 291] ment that we are obligated to take them in the interest of humanity.

Assistant Commissioner Nyka: I think this is backed up by sufficient testimony to allow it to go in for what it is worth.

Mr. Schwarzbach: Subject to my objection?

Assistant Commissioner Nyka: Yes. Exhibit 17 may be filed and admitted.

(Whereupon the said document so offered and received in evidence, marked "Respondent's Exhibit 17, #26601, 9-14-38," is hereby made a part of the record herein.)

Assistant Commissioner Nyka: Have you offered evidence on this?

Mr. Campbell: I understood Mr. Schwarzbach will agree that Mr. Wicks would testify as to the correctness of that.

Mr. Schwarzbach: I have admitted that the statement you made is a fact.

Mr. Campbell: And I understood that the proving of it is waived, but that you want to object to it as to its materiality; is that correct?

Mr. Schwarzbach: That is correct.

Assistant Commissioner Nyka: Very well.

Mr. Campbell: Mark this "Exhibit 18."

(Which said document was marked "Respondent's Exhibit 18, #26601, 9-14-38," for identification.)

Mr. Campbell: In view of the decision of our Supreme Court in 364 Ill. 213, and financial conditions which otherwise might be considered in a matter of this kind, to be followed up by other testimony, this merely being one of the
[fol. 292] items, I want to offer Exhibit 18 in evidence. I will prove the authenticity of it if you desire. It will be followed by substantiating testimony as to the cost to the company of what is described here.

Mr. Schwarzbach: I will make the objection that it is absolutely immaterial, in my opinion, when it comes to the

question of safety. If it were a question of rate increase, it would be very material, but for the purpose of safety to the switchmen and the employes and the public, the question of cost is not material. There are a number of cases along that line.

Mr. Campbell: The Supreme Court has held if an order would impose onerous conditions, that is a fact that may be considered. We will have to follow that up with testimony.

Mr. Schwarzbach: I object very strenuously to it.

Assistant Commissioner Nyka: Objection overruled. It may go in for consideration of the Commission. The Commission is a fact-finding body and will consider evidence as to finance. It may go in for what it is worth. It might not enter into the safety proposition, but it may be admitted for what it is worth.

Mr. Schwarzbach: Subject to our objection?

Assistant Commissioner Nyka: Subject to your objection.

Ira Davis:

After objection was made by Mr. Schwarzbach, as shown on Abs. p. 105, respondent, through its counsel, asked to have the ruling of the Commission on this proposition, stating it was essential, and the Assistant Commissioner stated that ruling would be reserved for the Commission. [fol. 293]. Whereupon Mr. Campbell, for respondent, made the offer shown at the top of page 105 of the abstract. Whereupon the witness Davis stated, in reply to question propounded by the Assistant Commissioner, that sixty-four passenger trains used the bridge each day. Objection was made by petitioner to the offer on the ground that it goes beyond the Illinois line. Whereupon Mr. Campbell, for the respondent, stated that the purpose was to show conditions there and to follow it up with testimony to show that it would be wholly impracticable, if an order were entered, for a caboose from the middle of the river to any place in Illinois or from any place in Illinois to the middle of the river, to comply with that order without affecting interstate commerce. Whereupon Mr. Schwarzbach, for the petitioner, asked counsel for respondent whether he meant to say that respondent could not have a caboose go all the way across the river, to which Mr. Campbell replied that the

effect of the order would be to take the caboose to the middle of the river. The Assistant Commissioner then stated that they would allow the Commission to decide the question as to whether it should go past the center of the bridge. Whereupon Mr. Campbell, for the respondent, made the offer shown (Rec. p. 391), starting about the middle of page 105 of the abstract. Whereupon the Assistant Commissioner stated that they had no jurisdiction across the river. Whereupon Mr. Campbell stated that he wanted the evidence in the record. Whereupon the Assistant Commissioner stated that this was a question for the Commission to decide after all the evidence was in. Whereupon Mr. Campbell stated that he was asking for a ruling on it now, and asked what the Examiner's ruling was as to [fol. 294] whether he could examine this witness on these questions. Whereupon the Assistant Commissioner sustained the objection.

IRA DAVIS, Direct examination:

About fifty-four passenger trains cross the Merchants Bridge each day and about the same number of freight trains. My answers as to the Eads Bridge apply to the Merchants Bridge as to the questions asked concerning that bridge. The Red Ball trains on the major eastern roads leave from 11:30 a. m. to 2:00 a. m. The perishable freight for these trains cannot be brought over all at once. We handle it as it comes and then deliver it as it comes in. We classify one train and deliver it immediately and get it out of the way for the second one. We can't hold the freight for any one line and make one delivery because it doesn't give the connecting line time to inspect their freight, classify and go on their run. That makes us make one to three deliveries from each connecting line, so they can be connected and switched, so that at closing time only a few cars are left. In answer to a question as to how long those Red Ball trains wait in the morning, the witness said that there is more live stock from the Kansas City market going east to Indianapolis and Cincinnati, and some to Baltimore. If the number of cars in the train is great enough, they will hold thirty or forty minutes if the west side connection happens to be late.

Mr. Marks: I would like to have the record show that in connection with this case the Commission has instructed

[fol. 295] Mr. R. B. Thomas to conduct an investigation of the subject matter contained in the complaint. Further, the Commission directed Mr. Thomas to prepare a report on this investigation, which was to be and which has been submitted to both parties.

Also Mr. Thomas was instructed to be prepared to be directly examined by counsel for the Commission and cross-examined by counsel for each of the parties.

Mr. Campbell: As a Commission witness?

Mr. Marks: As a Commission witness.

Mr. Campbell: Now, if the Commission please, respondent objects to the calling of Mr. Thomas as a so-called Commission witness by the Commission for the reason that this is a proceeding brought by the petitioner against the respondent for certain relief desired by the petitioner. There is no provision whatever in the law under which the Commission exists and functions for the calling of a so-called Commission witness. We submit that this case must be tried as a case would be tried in the courts of the state.

The Commission has only a limited authority granted to it by the statutes, under the decisions of the court, and it is wholly without power, jurisdiction, right or authority to call on its own motion, as a so-called Commission witness, its inspector, chief inspector, to testify in this case. Such proceeding is not authorized by the act under which the Commission functions, and would deprive the respondent of its privileges of law, in violation and contravention of the Constitution of the United States of America and of the State of Illinois.

Mr. Schwarzbach: On behalf of the petitioner, I think Mr. Campbell is entirely wrong. I think the act gives the [fol. 296] Commission the right to make its own investigation and ask its inspector to testify directly for the Commission. The law is very clear on it.

Mr. Marks: I believe the statute is clear on that point, that in case the Commission deems it advisable it has the power to conduct its own investigation.

Mr. Campbell, after the direct examination of Mr. Thomas had been concluded and before commencing cross-examination, stated that without waiving the respondent's position as to the calling of this witness by the Commission and the introduction of the report, he desired to cross-examine the witness.

R. B. THOMAS, Cross-examination:

I would not be surprised if the Pennsylvania Railroad, for example, charged for a switch engine at the rate of $100.00 for an eight-hour period under present wages and conditions and prices and things of that kind. My figure of $75.00 a day is based on the days when I worked for the Illinois Central.

R. B. THOMAS, Further Cross-examination:

The only flagging equipment used in the Terminal yard is a white and red light in switching movements by the Terminal crews. Nothing is used by the rear brakeman in the daytime, although on one trip to the Pennsylvania a yellow flag was given the rear man and was displayed on the caboose.

STATEMENT OF INFORMAL HEARING

June 28, 1939, an informal conference was held before [fol. 297] the Commission on issue raised by request of complainant that inspectors of the Commission make an investigation of trans-Mississippi bridge runs of the respondent. Petitioner given leave to file brief within fifteen days and respondent given leave to reply thereto within ten days thereafter, and the issue of the inspectors making inspection of such trans-Mississippi runs taken under advisement by the Commission.

At the informal hearing before the Commission, the Acting Chairman stated that the question came up for consideration by the Commission as to whether or not the Commission had authority to have Mr. Thomas make an inspection of the trans-Mississippi runs, and to go out of the state in order to do so. Mr. Thomas stating that he would have to go outside the State of Illinois to make this investigation. That, in addition to runs in Illinois, there are runs originating in St. Louis that come over the two bridges and are delivered to these three yards in East St. Louis and return to St. Louis with the cars or transfer runs, and they operate in the State of Illinois from the yards to the state line. Mr. Thomas stated that he had in mind to start his investigation from the middle of the river, the state line, but he did not know how he could get off the train in the middle of the river; that to get off the

trains in the middle of the river on the bridges, he would be in a position of making a request; that those are rather heavy grades and there is an operating situation there that is rather aggravated, and if such a request was made, he would not consider it in line to make a request to stop the trains—they are very heavy trains. He would have to go to St. Louis and get off of the train right at the Eads [fol. 298] Bridge and start the investigation in Illinois, but he would have to be on the train before he arrived in Illinois. He would have to be on it after it was outside of the state. His investigation would stop at the state line, but the movements would all be movements from Illinois to Missouri, or Missouri to Illinois, interstate across one of the two bridges. That his understanding was that the runs actually originate in Missouri and come to Illinois and return from Illinois to Missouri. That they will bring a hundred cars to the yard, for instance, the same crew will take up the hundred cars and return to Missouri and in these movements they cross the Mississippi River across the bridges. The cut starts in Missouri with all the cars for Illinois, and it brings them to Illinois, and it picks up the cut from Illinois and takes them to Missouri.

Mr. Campbell then stated that, in addition to objections theretofore made to calling the witness, further objection was made that these runs are wholly interstate and that the Commission would have no jurisdiction in relation to whether cabooses were there or not, and stated that he had prepared a brief on the subject which he would be glad to file and would like to discuss it for a moment.

After Mr. Schwarzbach had stated that he had gotten a notice to appear on this date, but did not know what it was about, the Acting Chairman, Mr. Hart, stated that on June 16th petitioner was notified that on June 20th, 1939, the Commission at its Springfield office would consider the issue raised. Then followed some discussion of the legal point involved. The complainant was given permission to [fol. 299] file a reply brief to the brief filed on the jurisdictional question by respondent.

During the discussion, Mr. Campbell, for the respondent, stated that this jurisdictional question had been raised at the first hearing of this case. Whereupon the Acting Chairman of the Commission stated that it was also raised before the Commission assigned an engineer to make the investigation.

Mr. Campbell then discussed the question of the right of the Commission to call a court witness, which was also answered by Mr. Schwarzbach.

The Commission asked for extra copies of respondent's brief and gave petitioner fifteen days within which to answer the brief.

The brief of respondent on the jurisdictional question was accompanied by brief on many other questions raised in the case. The brief covered substantially the same questions as will be discussed in respondent's brief in this case.

A complete brief, consisting of thirty-nine pages, was filed by petitioner in reply to the brief of respondent and appears in full in the record.

There appears in the record in full the reply of the respondent to the brief filed by the complainant.

Over objection of respondent that he was expressing an opinion on an ultimate question of fact which was to be determined by the Commission if material, witness Thomas was permitted to state that in his opinion fifteen additional cabooses should be provided by respondent.

[fol. 300] Motion by respondent to strike the answer of witness Thomas on the grounds above stated and ruling reserved.

Ira Davis, Direct Examination:

A switching crew consists of three men. It would only be available for use of the rear switchman—the other two switchmen would ride on the front end. Even the rear switchman could not use the caboose when he was engaged in switching work, but only while it was moving between points. The only time the rear switchman would ride the caboose would be between one yard and the other.

Testimony of Mr. Davis relative to the use of his cabooses and shelter cabs in Missouri (Abs. p. 157) is said to be: "None of these are needed in Missouri." This should be abstracted that some of them are on runs in Missouri and some on interstate runs.

Printed copy of respondent's application for rehearing, consisting of thirty-six printed pages and setting up in detail all of the matters to be later presented to this Court in brief in this case.

Respondent's Exhibit 1, containing general rule that employes engaged in trains must know the location of and avoid injury by bridges, buildings, etc., which do not have

ample side and top clearances. Rule 791 provides that the overhead clearance of cables and wires across railroad tracks must be safe for a tall person standing on a moving high car, and requires report of any of which do not amply clear.

[fol. 301] Rule 302 is a warning to all employes that for their own safety they must familiarize themselves with bridges, viaducts, buildings, etc., that do not clear a man upon the top of covered cars, or while upon the side of a car or engine, or leaning out of the same that are located at various places on the property of the Terminal and other railroads and industries served by them. The rule calls particular attention to the principal overhead structures.

Exhibit 1 also contains a clause from the application for employment, in which each employe in his application certifies that he understands that there are a great many bridges, viaducts, overhead structures, buildings, etc., which do not clear a man standing on the top of a moving covered car or riding upon the side of a car or engine for which yardmen and others whose duties require them to ride on trains or engines must be on the constant lookout, and the employes agree to exercise all possible care and caution to avoid such obstructions. The application also certifies that the applicant understands and agrees that when it is necessary for him to go into the yards of other companies he must exercise the same care in looking out for obstructions which may be close to the track.

Respondent's Exhibit 2, containing miscellaneous rules.

Rule 61 provides that general orders and general notices containing special instructions and information supplementary to the rules will be placed upon bulletin boards, the locations of which are shown on the time tables. It also provides for posting at Union Station, St. Louis; for the [fol. 302] signing of receipts for such general orders.

Rule 62 provides that yardmasters, trainmen, etc., must examine the bulletin boards in their respective district before commencing each day's work, when practicable, otherwise at the first opportunity, but at least once each day, and sign receipts for general orders.

Rule 765 provides that all members of freight crews must be in position on top of cars, etc., to transmit signals or

otherwise assist in emergency, and that when necessary for better protection, or to throw switches, a member of the crew must be on front footboard of engine.

Rule 786 provides that when cars are being shifted over a highway or street crossing where no watchman is stationed, a member of the crew must protect the crossing.

Rule 302 provides that all members of freight crews must be in their proper but safe positions when moving through interlocking plants, through yards or on main tracks, where conditions may require it, to transmit signals or assist otherwise in emergency, and that when necessary for better protection or to throw switches, a member of the crew must be on front footboard of the engine.

Rule 332 provides certain speeds between certain points and through the tunnel.

Rule 337 provides where bulletin boards are, including places on the east side of the river.

Rule 360 makes certain limitations of speed at certain places on the lines of respondent.

[fol. 303] Rule 379 likewise gives location of certain bulletin boards, among which are Madison Yard, Brooklyn Shops, Madison Engine Terminal, CD Yard office, all in Illinois.

Respondent's Exhibit 3. Excerpts from the book of rules, advising that respondent is a terminal switching carrier, engaged wholly in yard operation.

Rule 101 provides that trains must be fully protected against any known condition which interferes with their safe pasage at normal speed. That when conditions are found which may interfere with the safe passage of trains at normal speed and no protection has been provided, such action must be taken as will insure safety. That in foggy or stormy weather which obstructs the view, also when the view is otherwise obstructed, enginemen and trainmen must be especially alert, and trains must be moved under such control as to insure stopping within distance track is known to be clear; also approach stations and street crossing so as to avoid danger to persons and vehicles.

Rule 109 calls attention to the fact that train movements are frequent, but often irregular, and that movements must be made with train under control.

Rule 308 provides that in fog or storm and when view is otherwise obstructed, trainmen must be especially alert.

RESPONDENT'S EXHIBIT 4 is the application for employment, containing the representations made by the applicant and the agreements made by him as set forth in the rules.

[fol. 304] RESPONDENT'S EXHIBIT 5, being General Notice 376, issued July 20, 1927, and giving the running times of lone engine, with clear track, under normal conditions of track and weather, between points named. The ones involving Illinois movements are:

Between Rose Lake and Madison Yard	20 minutes
Between Brooklyn Shops, Ill., and Bremen Ave., St. Louis	15 minutes
Between Brooklyn Shops and North Market St., St. Louis	19 minutes
Between CP. Junction and Valley Junction	20 minutes
Between Wabash Granite City Yard and Madison Yard	10 minutes
Between A. & E. Connection, Granite City and Madison Yard	6 minutes

The order also gives the maximum running time of freight trains, with clear track, under normal conditions of track and weather, between points named. The interstate running times are:

Between Madison Yard and Signal Bridge #20	35 minutes
Between Signal Bridge #20 and McKinley Crossing, Madison	30 minutes
Between Madison Yard and MKT Yard	35 minutes
Between MKT Yd. and McKinley Crossing, Madison	35 minutes
Between Madison Yd., Ill., and R. I. Yard, St. Louis	20 minutes
Between R. I. Yard and McKinley Crossing, Madison	20 minutes
[fol. 305] Between Madison Yard and Luther Yard, St. Louis	30 minutes
Between Luther Yard and McKinley Crossing, Madison	30 minutes
Between Madison Yard and Bremen Ave., St. Louis	15 minutes
Between Bremen Ave. and McKinley Crossing, Madison	15 minutes

Between CP. Junction and Dupo Yard	50 minutes
Between Dupo Yard and Madison Yard	60 minutes
Between CP. Junction and Valley Junction	30 minutes
Between Valley Junction and Madison Yard	35 minutes
Between Madison Yard and A. & E. Connection, Granite City	15 minutes
Between Madison Yard and Wabash Gr. City Yard	20 minutes
Between Wabash Gr. City Yard and Madison Yard	20 minutes
Between CP. Junction and Pennsylvania Yd., Rose Lake	25 minutes
Between Rose Lake and Madison Yard	30 minutes

The notice further provides that the schedule given above does not relieve engine men from complying with all speed restrictions.

Respondent's Exhibit 6. General Notice No. 438, issued June 25, 1930, giving running time between certain points in Illinois:

From CD to M&O Tolson Yard	
Round trip	65 minutes
Each way	23 minutes
[fol. 306] From CD to East End Rose Lake	
With train, each way	20 minutes
With light engine, each way	15 minutes
Round trip, with train	90 minutes
From CD to I. C. Yard	
With train, each way	20 minutes
With light engine	15 minutes
From CD to Southern Ry.	
With train, each way	20 minutes
With light engine, each way	15 minutes
Round trip, with train	80 minutes
From CD Yard to L&N.	
With train, each way	10 minutes
With light engine, each way	5 minutes
From CD to B&O	
With train, each way	7 minutes
With light engine, each way	4 minutes

From CD to Wiggins

With train	15 minutes
With light engine, each way	10 minutes

From CD or Eastbound to C&A

With train, each way	20 minutes
With light engine, each way	10 minutes

The bulletin states that this time is figured with an average train; that when conditions will permit better time is expected, and trainmen are expected to move as fast as conditions and rules will permit.

RESPONDENT'S EXHIBIT 7, General Notice #461, is another bulletin giving various speeds, and is similar to Respondent's Exhibit No. 6, except some slight variations in running time are made.

RESPONDENT'S EXHIBIT 8, General Notice, May 12, 1932, fixing running time between CD Yard and Penna. inspection pit at 12 minutes.

[fol. 307] RESPONDENT'S EXHIBIT 9, describing certain changes in running time between CD Yard and Southern Railway Yard at East St. Louis, with a train, each way 15 minutes, with light engine, each way 12 minutes, round trip, with train, not to exceed 30 minutes.

RESPONDENT'S EXHIBIT 10 is tabulation of movements ordinarily made by switching crews from the three major Illinois yards to various connections, and shows the distance so far as the runs concerning which an order is made by paragraph 34 of the Order in this case. The distances are:

CD to Penn.	10,755 feet
CD to M&O	8,500 feet
CD to IC.	6,800 feet
CD to Southern	11,280 feet
Madison Yard to Granite City	10,700 feet
Madison Yard to Coke Plant, Granite City	17,675 feet
Madison Yard to CD Yard	9,515 feet
Madison Yard to A&S Valley Junction	30,235 feet
Madison Yard to IC.	32,300 feet

All of the last three are Valley Junction runs.

Madison Yard to St. L. & O'Fallon	19,105 feet

Madison Yard to Valley Junction, representing the A&S, Cotton Belt and IC, varies from 30,235 to 32,870 feet.

Madison Yard to Penna.	14,145 feet
Wiggins #2 to Madison Yard	8,325 feet
Wiggins #2 to Dupo	41,520 feet
Wiggins #2 to IC.	10,390 feet
Wiggins #2 to St. L. S. W.	22,850 feet
Wiggins #2 to Monsanto Chemical	16,455 feet
Wiggins #2 to Phillips Petroleum	21,315 feet
Wiggins #2 to Cahokia	15,930 feet

[fol. 308] All measurements from end of one yard to beginning of another.

RESPONDENT'S EXHIBIT 14, General Order No. 1942, issued June 9, 1938, and containing notice of certain changes in certain signals at East St. Louis.

RESPONDENT'S EXHIBIT 15 is a table furnished by the United States Meteorological Bureau, showing average monthly temperatures from January, 1927, to December, 1936. A typical year is 1936, showing the lowest average temperature for any month to be 24.4 degrees and the highest to be 87.4 degrees.

RESPONDENT'S EXHIBIT 16 is a tabulation showing deliveries for late morning trains in Illinois on June 9, 1938. The exhibit shows thirteen destinations, with delivery of 335 cars, of which 168 were so-called "hot" cars, containing perishable goods or livestock, and 167 cars containing dead freight. The second page of the exhibits shows similar statement for the same day, or receipts for late morning trains from nine other points of origin, containing 296 cars, of which fifty were refrigerator cars that had to be placed for icing.

The last page of the exhibit shows receipts of cars on June 9, 1938, from thirteen places of origin, showing receipt of 297 cars, of which 186 were "hot" and stock cars and 111 containing dead freight.

Another page of Exhibit 16 shows receipt, for 2:00 a. m. trains, June 10, 1936, from sixteen destinations of 362 cars,

of which 237 were "hot" cars, thirteen were live stock cars, 112 contained dead freight and thirty-five were refrigerator [fol. 309] cars requiring icing, all being received between 10:30 p. m. June 9 to 1:35 a. m. June 10, and all for the Red Ball trains leaving at 2:00 a. m.

RESPONDENT'S EXHIBIT 18, showing Illinois taxes for the year 1935, paid in 1936, showing $525,852.42, of which amount $110,312.48 was paid in Madison County, Illinois, and $415,538.94 was paid in St. Clair County, Illinois.

RESPONDENT'S EXHIBIT 19. Statement showing injuries by sudden stop to switchmen in or on cabooses and cars in the rear of freight trains from 1928 to 1936, inclusive, showing eight injuries in cabooses, one in rear end and seven injured in cars during that period.

RESPONDENT'S EXHIBIT 20, being statement of revenue cars handled by it from January 1, 1931, to December 31, 1937. Tabulation is given by months, but the totals for each year are as follows:

1931	1,088,211 cars
1932	816,786 cars
1933	828,329 cars
1934	877,068 cars
1935	900,581 cars
1936	1,066,892 cars
1937	1,109,147 cars

RESPONDENT'S EXHIBIT 21 is a graph showing revenue cars handled from 1931 to 1938, inclusive, showing the same figures reflected on Exhibit No. 20, with 1938 added to the graph, and showing a reduction in revenue cars handled per month, so that the average per month for 1938 was less than 70,000.

[fol. 310] RESPONDENT'S EXHIBIT 22 is an income statement for seven years, ending December 31, 1937, and shows the following:

1931 Loss	$189,031.65
1932 Loss	968,789.29
1933 Gain	6,690.34
1934 Gain	196,546.52
1935 Gain	155,317.61
1936 Gain	40,932.82
1937 Loss	563,355.23

The exhibit further shows for the seven years the total net loss was $1,321,688.88, or an average loss for the seven years per year of $188,812.70. The exhibit further shows that the total railway operating revenues for the seven years were over $50,000,000.

RESPONDENT'S EXHIBIT 23 is a consolidated income statement from January 1 to July 31, 1938, and also compares July, 1937, and July, 1938, and the first six months period of 1937 and 1938, showing for the first six months of 1938 a loss of $1,085,352.96 as compared to loss for the first six months of 1937 of $132,252.92, and showing a loss for July, 1938, of $112,393.43 compared to a loss of $15,169.95 for July, 1937.

RESPONDENT'S EXHIBIT 24, showing comparative balance sheets as of July 31, 1938, and July 31, 1937; showing investments as of July 31, 1938, of approximately $73,000,000, or a decrease of over $750,000.00 since the preceding July 1st.

RESPONDENT'S EXHIBIT 25 is an income statement for the two years of 1928 and 1929, showing a net income in 1928 of nearly $1,200,000, and in 1929 of approximately $1,000,000.

[fol. 311] RESPONDENT'S EXHIBIT 26, being a statement of taxable income reported on federal income tax returns for ten years ending December 31, 1937. The difference between it and income statement being explained in the testimony. Respondent reported for taxable income in the ten years as follows:

1928 Net income of	$1,134,917.88
1929 Net income of	703,054.21
1930 Deficit of	105,814.29
1931 Deficit of	594,072.02
1932 Deficit of	1,127,606.47
1933 Deficit of	227,170.31
1934 Deficit of	244,356.26
1935 Taxable income of	19,108.32
1936 Deficit of	123,276.32
1937 Deficit of	625,925.89

The net deficit for the ten years was $1,191,141.15, or an average annual deficit for the ten-year period of $119,114.11.

RESPONDENT'S EXHIBIT 27, annual report of respondent for the year 1937, containing detailed figures for 1937 and 1938, as hereinbefore set forth.

RESPONDENT'S EXHIBIT 28, temperature readings January, 1927, to December, 1931, taken from the records of the U. S. Department of Agriculture, Weather Bureau, St. Louis, Missouri. A typical year would be 1929. The minimum temperature for January of that year was 17.7; for February, 20.7; for March, 41.1; for April, 49.5; for May, 53.8; for June, 64.1; for July, 71.3; for August, 67.3; for September, 60.0; for October, 50.7; for November, 34.7, and for December, 30.4.

The maximum temperature for the various months of [fol. 312] that year varied from 37.5 in January to 88.5 in July, and the mean temperature for that year for each month varied from 27.6 in January to 79.8 in July.

RESPONDENT'S EXHIBIT 29. Tabulation showing temperatures for 1933. In that year the lowest temperature was 5 degrees below zero in February, with a maximum of 71 degrees in February and a mean for February of 35.1. Other months in which the minimum was below freezing were January, with a minimum of 20 degrees, maximum of 65 degrees and a mean of 43.6; March with a minimum of 14 degrees, a maximum of 85 degrees and a mean of 44.8; November with a minimum of 20 degrees, maximum of 79 degrees and a mean of 46.0 degrees, and December with a minimum of 4 degrees, maximum of 72 degrees and a mean of 40.2 degrees.

RESPONDENT'S EXHIBIT 30 is the annual meteorological summary for the year 1932 issued by the Weather Bureau of the Department of Agriculture.

RESPONDENT'S EXHIBIT 31 is a similar report for 1934.

RESPONDENT'S EXHIBIT 32 is a similar report for 1935.

RESPONDENT'S EXHIBIT 33 is a similar report for 1936.

RESPONDENT'S EXHIBIT 34 is a similar report for 1937.

RESPONDENT'S EXHIBIT 35 is a memorandum of an understanding and agreement between Respondent and the Bureau of Animal Industry of the United States relative to maximum time allowed for transporting live stock from different points in St. Louis and Illinois to the National

[fol. 313] Stock Yards. Following is a table indicating the contents of the exhibit:

Contents of Exhibit

First movement	8.6	Miles	3 Hrs. 30 Min.
Second movement	5.6	Miles	3 Hrs.
Third movement	6.62	Miles	3 Hrs.
Fourth movement	2	Miles	1 Hr. 30 Min.
Fifth movement	2	Miles	1 Hr. 30 Min.

The other movements covering all points of origin on both sides of the river to National Stock Yards at East St. Louis show similar times for similar distances.

Respondent's Exhibit 36 is a statement showing movements into and out of CD yards during a typical twenty-four hour period. It shows that Cabin No. 1 crews made twenty-nine movements out of that yard to other yards and the engine number, the time it left CD yards and the time returned. The first page of the statement covers all deliveries made from Cabin No. 1 to the south, namely, Pennsylvania, L. & N., M. & O., I. C. and Southern. The second page shows twenty-five movements during the same twenty-four hour period from the St. Louis district, the arrival time at CD yard, East St. Louis, while the third page covers these same Eads Bridge freight crews operating westbound out of CD yard to St. Louis. The exhibit also shows the time of arrival at CD yard and time departed. The fourth page of the exhibit shows CD delivery crews, CD lead crews, Ead Bridge freight crews and Wiggins Ferry crews—deliveries made through Bridge Junction territory during the same twenty-four hour period; [fol. 314] showing fifty movements during the twenty-four hour period. Page 6 of the exhibit shows CD delivery, CD lead, Merchants or Eads Bridge crews—deliveries made from north end of eastbound yard, showing ten such movements during the twenty-four — period. It also shows six movements made over the Merchants Bridge during the same period. Page 7 of the exhibit shows movements into and out of Madison yard for the twenty-four hour period, October 27, 1939, showing thirty-nine movements during the twenty-four hour period leaving that yard, and the destination and time of departure and time of return. It also

shows during the same period twenty-one movements of west side crews into the Madison yard, showing the time of arrival, the point of origin and the time of departure on the return trip. Page 9 shows movements into and out of Wiggins yard No. 2 and No. 5 for the same twenty-four hour period, showing seventy-one such movements during the twenty-four hour period.

RESPONDENT'S EXHIBIT 37 is a statement of movements to heaviest connections out of CD yard, East St. Louis, during the same twenty-four hour period, showing eight movements to the Pennsylvania, nine to the Alton-B. & O., eleven to the Wabash and ten to the Big Four. This statement also has a statement attached to it showing that it indicates the intensity of movements through this yard, all in switch service, and the short running times between connections. The ice house is located in the yard, which is the concentration point for all perishable freight that must be handled expeditiously and in accord with departing times of outbound trunk line connections. The exhibit further recites that to add cabooses to all these deliveries would add to the [fol. 315] congestion and chaos, result in missed connections in some instances to the detriment of traffic through the gateway, and without benefit to anyone, and that the rear men could not be in the cabooses enough to do them any good. The exhibit also contains a recitation that the statement shows that one caboose could not suffice in each delivery service, and that it will be noted in the case of the Pennsylvania and the Alton-B. & O. that crews leave the yard for those lines while others are still away.

RESPONDENT'S EXHIBIT 38, showing service buildings and other structures located in yards for protection of the health, safety and comfort of switching forces. The statement shows three of these service buildings in the Madison yard—one equipped with showers, wash stands, toilets, lockers, steam heat, electric light and drinking water. Another equipped with lockers, wash stands, drinking water, electric light and stoves, and another equipped with wash stands, drinking water, lockers, electric light, stove and outside toilet.

The statement also shows six of these service buildings at the CD yard—one equipped with toilets, wash stands, lockers, stoves, electric light and drinking water. Another equipped with wash stands, showers, steam heat, electric

lights and drinking fountain. Another equipped with wash stands, lockers, stove, electric lights and drinking water. Another equipped with stands, showers, lockers, toilet, stove, electric light and drinking water. Another equipped with wash stands, showers, lockers, toilet, stove, electric light and drinking water, and another equipped with lockers, drinking water, stove and electric lights.

[fol. 316] The statement also shows five service buildings in Wiggins No. 2 yard. One equipped with toilets, lockers, hot water heat, electric lights, wash stands, showers and drinking water; another equipped with running water, stoves, outhouse and electric lights, and three equipped with stoves.

The exhibit further shows that, in addition to the above, similar facilities are provided in practically every connecting line yard, and that switch crews working in and out of these yards start and stop work in those yards, making the facilities available at all times.

The second page of the statement shows five such service buildings along routes of the Madison yard crews and used by them in effecting deliveries between connections; one such as to the CD yard crews and five at to Wiggins No. 2.

[fol. 317] ADDITIONAL RECORD

Placita.

Copy of notice of appeal, with proof of service on Illinois Commerce Commission, filed in office of Circuit Clerk, St. Clair County, March 26, 1940.

NOTICE OF APPEAL

To the Illinois Commerce Commission:

You are hereby notified that Terminal Railroad Association of St. Louis, a corporation, respondent in the above entitled cause and affected by the order of the said Illinois Commerce Commission entered in said cause on February 1, 1940, and served upon this respondent on February 6, 1940, hereby appeals from the said order of the said Illinois Commerce Commission to the Circuit Court of the County of St. Clair in the State of Illinois; said county being one of the counties in which the subject matter of the hearing upon which said order was entered is situated.

Respondent's application for rehearing in the above entitled cause was filed with the Illinois Commerce Commission on February 26, 1940, and was refused and denied by the said Illinois Commerce Commission on March 6, 1940, service of said final order refusing and denying said application for rehearing having been had on this respondent on March 8, 1940.

Respondent prays that a certified copy of the order hereby appealed from, and a proper certified copy of the record in said cause may be filed with the Clerk of said [fol. 318] Circuit Court within the times and in manner and form as provided by law.

Dated this 25th day of March, 1940.

Terminal Railroad Association of St. Louis, a Corporation, Respondent in Said Cause, by Bruce A. Campbell, One of Its Attorneys of Record.

Service is hereby acknowledged of notice of appeal, of which the above is a true, correct and exact copy, this 25th day of March, 1940.

Illinois Commerce Commission, by Joseph E. Knight, Its Secretary.

Filed March 26, 1940. Charles G. Becker, Circuit Clerk. Certificate of Clerk to additional record.

Respectfully submitted, Kramer, Campbell, Costello & Wiechert, Attorneys of Record for Terminal Railroad Association of St. Louis, Defendant-Appellee.

Carleton S. Hadley, Walter N. Davis, Of Counsel.

[fols. 319-320] In Supreme Court of Illinois

* * * * * * *

Order of Submission—November 18, 1941

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court that appellants hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors

assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motion being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by Alvin E. Stein and Albert E. Hallett for appellants and Bruce A. Campbell for appellee is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 321] In Supreme Court of Illinois

Docket No. 26261—Agenda 8—November, 1941

Brotherhood of Railroad Trainmen et al. Appellants,

v.

Terminal Railroad Association of St. Louis, Appellee

Opinion—Filed March 16, 1942

Mr. Justice Stone delivered the opinion of the court:

Appellants seek reversal of a judgment of the circuit court of St. Clair county setting aside an order of the Illinois Commerce Commission requiring appellee to furnish, throughout the year, and maintain, caboose cars or shelter cars to be attached to cuts of freight cars transported to and from its yards in Illinois. The cause arises by petition of appellant Brotherhood of Railroad Trainmen, an organization representing trainmen and switchmen employed by appellee, filed with the Illinois Commerce Commission requesting that an order be entered requiring appellee to furnish caboose or shelter cars for its switchmen while in the performance of their duties in the territory in and around East St. Louis, Illinois. The petition alleged that appellee has failed to provide such cars for switchmen in the above-mentioned territory, and as a result thereof switchmen, in the performance of their duties on transfer trains are necessarily required either to ride on the draw-bar, in between

freight cars, or on the top, or on the side of freight cars where numerous reduced vertical and horizontal clearances prevail, thus endangering the life, health and safety of such switchmen and of other employees, and of the public within the State of Illinois. Appellee's answer denied the power, right or jurisdiction of the Illinois Commerce Commission to enter any order in regard to the subject matter of the complaint so far as any movements in interstate commerce are concerned, and alleged that it now provides all the facilities reasonably necessary for the health, safety and lives of said employees.

Appellee is a railroad corporation which performs terminal services in the railroad switching district of East St. Louis, Illinois, and St. Louis, Missouri. Switchmen in its employ are assigned to particular switching crews. These crews make and break up trains in the yards, make deliveries from connecting roads to appellee; make transfer runs from the various yards of appellee to and from industries; make up trains and couple cars together, see that the air-brakes are coupled and in order on the train, and when the train leaves the yard for a destination the switchmen take their proper positions on the train, the rear man taking his position on the rear car of the train, where he is required [fol. 322] to ride. His duties are to line all switches back into proper position after their use by the train, and in case of a reverse movement, to watch street and highway crossings to protect the public. On some of the transfer runs, side or overhead clearance is insufficient to permit riding on the side or top of the rear car, in which case the rear switchman is required to ride the rear coupler of the car. The length of the trains handled by a crew on a trip varies from one to a hundred cars. A caboose is a railroad car furnished for the housing of train crews and equipped for their safety; provides a place for the crew to carry necessary flagging equipment, raincoats, extra or excess clothing, necessary first aid equipment and lunches; also to do any necessary clerical work. During the winter months, the handholds, draw-bars and sill steps of cars are often covered with ice, making it difficult for switchmen to get to the top of a car or to prevent being jerked or jarred off. No caboose or shelter cars are furnished to crews working out of certain of the involved yards, though they are furnished from October to May each year on other runs by

appellee, and on still other runs are furnished the year round. Various of the runs are entirely within the confines of the State of Illinois, others originate in Illinois and terminate in the yards of appellee in Missouri by crossing the Eads or Merchant's bridge, or originate in Missouri and after passing over one of those bridges terminate in one of the yards of appellee in Illinois. Ninety-eight per cent of the merchandise transferred in the runs between appellee's yards is being transported in interstate commerce. About sixty-eight passenger trains cross the Eads bridge each day. During the early part of each week about the same number of freight trains cross the bridge and later in the week the freight trains exceed the passenger trains in number. Approximately the same number of trains cross the Merchant's bridge each day.

The Eads and Merchant's bridges span the Mississippi river between East St. Louis in Illinois and St. Louis in Missouri. Each bridge has thereon double track railroads connecting with appellee's yards. The Commerce Commission found that the boundary line between the State of Illinois and the State of Missouri intersects the Eads bridge at a point about 1000 feet west of the west curb of Front street in the city of East St. Louis, and the Merchant's bridge at a point about 775 feet west of the Illinois shore line when the river is at a stage of 2.4 feet.

[fol. 323] The commission's order, so far as the principal questions here are concerned, consisted of two items or findings and orders. By finding No. 34 it found that it is reasonable to require appellee to furnish, maintain and operate caboose cars throughout the year on its various transfer, delivery and industrial runs in and out of its three yards: (1) Central District Yard, (2) Madison Yard, and (3) Wiggins No. 2 Yard, the order specifying the particular runs among those yards or to line roads, all of which are within Illinois; and its finding No. 35 was the same as finding No. 34 as to reasonableness of the requirement, and ordered that in so far as operated within the State of Illinois: (1) in all runs into or out of C. D. Yard *via* Eads bridge, (2) runs *via* Merchant's Bridge moving in or out of (a) Madison Yard, and (b) Wiggins No. 2 Yard, appellee furnish, maintain and operate caboose cars on its transfer, delivery and industrial runs.

On appeal the circuit court found that the portion of the order of the commission requiring cabooses to be attached

to runs moving between appellee's yards in Illinois and over the Eads and the Merchant's bridges, is an interference with interstate commerce and beyond the power of the Illinois Commerce Commission. The court therefore set aside and reversed the order of the commission. It did not consider the validity of finding No. 34 and that part of the order since its power of review was merely to confirm or set aside the order as a whole. This was the correct procedure. *Brotherhood of Railroad Trainmen* v. *Elgin, Joliet and Eastern Railway Co.* 374 Ill. 60.

The principal question in the case concerns the validity of the order of the commission requiring cabooses for these runs over the bridge. Though the commission's order applies only to cuts of cars moving within the State, it is argued by appellee, and not disputed, that the only practical way in which the order can be carried out on runs across the river is to carry these cabooses across the bridge into appellee's yard on the opposite side of the river.

Appellants argue that notwithstanding the trains involved in order 35 are moving in interstate commerce, the attaching of cabooses thereto is not a direct burden on interstate commerce but affects it but indirectly or incidentally, and that the order lies within the inherent power of the State to enact reasonable regulations for the protection of the health, lives and safety of persons within its confines. It is urged that only when Congress has acted is the power [fol. 324] of the States impaired, and then only to the extent that their regulations shall not be such as to be in conflict with or repugnant to the action so taken by Congress. Appellee insists that the order based upon finding No. 35 as to the bridge runs is an undue burden upon, and a regulation of, interstate commerce, in violation of the commerce clause of the Federal constitution, and takes appellee's property without due process of law.

It is settled by decisions of the Supreme Court of the United States that a State can do nothing which will directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic. (*Atlantic Coast Line Railroad Co.* v. *Wharton*, 207 U. S. 328, 52 L. ed. 230; *Austin* v. *Tennessee*, 179 id. 343, 45 L. ed. 224; *Illinois Central Railroad Co.* v. *Illinois*, 163 id. 142, 41 L. ed. 107.) It is equally well settled that State or local enactments, passed in the exercise of the police power of the State, in the interest of the public health and safety, notwithstanding the regulation

may incidentally or indirectly affect interstate commerce, are valid. *Minnesota rate cases*, [*Simpson* v. *Shepard*,] 230 U. S. 352, 57 L. ed. 1511, and the cases therein cited.

The question involved in this case is one of power of the Commerce Commission. The question whether a statute of the State or an order of the commission acting within the authority conferred upon it by the General Assembly of the State, imposes a direct burden upon interstate commerce, is one of which the Supreme Court of the United States is the final arbiter. There are, however, certain principles under which rights of the States in the premises are to be recognized. All powers inhering in the people of the States, which have not been expressly granted to the United States or prohibited to the States, remain with the people. The State, by reason of its inherent and reserved police power, may enact laws promoting the peace and good order of society, for the preservation of life and health, or conducive to the comfort, convenience and welfare of the people. Notwithstanding acts coming within this reserve police power operate on the movements of interstate commerce and persons engaged therein, such law is nevertheless valid unless its effect is to directly lay some burden or restriction on interstate commerce which would not otherwise exist. (*Hennington* v. *State of Georgia*, 163 U. S. 299, 41 L. ed. 166; *Minneapolis and St. Louis Railroad Co.* v. *Emmons*, 149 id. 364, 37 L. ed. 769; *People ex rel. Stead* v. *Chicago, Indianapolis, and Louisville Rail-*
[fol. 325] *way Co.* 223 Ill. 581.) Though by the Federal constitution Congress is given exclusive power to regulate commerce, the States may, in the exercise of the police power, make reasonable rules in regard to the method of carrying on interstate business within the State, such as to provide precautions that shall be used to avoid danger to those engaged in interstate commerce within the State, or to the public, or may designate facilities for the comfort of passengers and employees, safety of freight carried, and the like. The test of the validity of such enactments or orders is whether they are consistent with the general requirement that interstate commerce shall be free and unobstructed. If they are, they do not amount to a regulation of such commerce. *Houston and Texas Central Railroad Co.* v. *Mayes*, 201 U. S. 321, 50 L. ed. 772.

The fact that a railroad may be engaged in both interstate and intrastate commerce, does not prevent a State

from adopting such regulations as it may deem proper to provide for the safety of the men engaged in carrying on intrastate commerce, if such regulations are not inconsistent with or repugnant to acts of Congress adopted for the regulation of railroads engaged in interstate commerce. (*Luken* v. *Lake Shore and Michigan Southern Railway Co.* 248 Ills. 377; *People* v. *Chicago, Indianapolis and Louisville Railway Co.* supra; *Missouri Pacific Railway Co.* v. *Kansas*, 216 U. S. 262, 54 L. ed. 472.) It not only lies within the power of the State, but it is its duty, to establish such regulations as are reasonable and necessary for the safety of those engaged in the business conducted within the State. The rule is settled that so long as Congress does not occupy the field of regulation to be considered in a given case, each State is empowered to make regulations within that field regarding the safety of persons engaged in interstate commerce that passes through the State. Such regulations do not purport to regulate interstate commerce, but to care for the safety of persons within its borders. *Chicago, Rock Island and Pacific Railway Co.* v. *Arkansas*, 219 U. S. 453, 55 L. ed. 290.

In the case before us the order of the Commerce Commission appealed from, affected two classes of freight movements. The first was dealt with in what is known as finding No. 34 of the order, and had to do with interyard movements of freight, wholly within the State, but which movements contained largely shipments destined for interstate commerce; and finding No. 35 of the order, having [fol. 326] to do with switching movements of cars across the Mississippi river into appellee's yards in Missouri. The order required the use of cabooses or shelter cars in so far as those movements take place within the State.

We do not doubt the power of the Commerce Commission, delegated to it by the General Assembly under the police power, to make reasonable regulations protecting the health, safety and welfare of those engaged in appellee's switching business, so long as such regulations do not constitute an attempt to regulate, or do not directly burden interstate commerce, or run counter to Federal regulations on the subject. Appellee says these orders are attempts to regulate interstate commerce and constitute a direct burden upon such commerce and so are void for want of jurisdiction in the commission to promulgate them. It is not claimed that the Congress has specifically legis-

lated on the subject of its use of these cabooses though it is argued that Congress has preempted the field.

The evidence shows that without cabooses or shelter cars, switchmen are required to ride on the outside of the rear car of the cut of cars being moved, and that in many places in the yards and on the bridges, side or overhead clearances are insufficient to permit riding on the side or top of the cars, with the result that the switchman is required to ride upon the coupler, which is dangerous and becomes specially so during storm or winter periods. It is shown that the jarring or sudden stopping or starting of a cut of cars may cause the switchman to lose his hold and be thrown and to suffer injury. Protection against casualties of that sort is not only within the power but the duty of the State when the same is exercised in a manner not inconsistent with the Federal laws governing interstate commerce, where such have been enacted or where such regulations do not result in a direct burden on interstate commerce.

As we have seen, the circuit court did not pass upon the validity of finding No. 34 of the commission's order. However, both parties have briefed the question concerning the power of the commission to enter its order on that finding, and the reasonableness of that order, and as that question is involved in the validity of finding No. 35, pertaining to transfers across the bridges, it becomes necessary to examine fundamental questions involved in both findings.

Whether either of these findings and orders of the commission are valid, depends in the main upon whether compliance with such orders lays a direct burden on interstate commerce. Where the effect of an intrastate transaction [fol. 327] or regulation, as applied to interstate commerce, is merely indirect, the regulation producing such transaction remains within the domain of the State power. (*Schechter* v. *United States*, 295 U. S. 495, 79 L. ed. 1570.) As was said by the Supreme Court of the United States in *Carter* v. *Carter Coal Company*, 298 U. S. 238, 80 L. ed. 1160, quoting from the *Schechter case*, "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal government. • • • The

distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system." It was in the *Carter case* pointed out that the word "direct" "implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character."

Counsel argue as to both findings No. 34 and No. 35 of the Commission's order that they are a burden on interstate commerce in that they require an additional amount of time to attach and detach these cabooses and are unreasonable in that they involve a very large additional expense to appellee, and so constitute an unwarrantable interference with interstate commerce. The evidence before the commission as to the amount of time consumed was in conflict, ranging from eleven minutes to forty minutes per movement, though appellant concedes that some time is required to add a caboose to these cuts of cars. It is argued that time required to comply with this order may, at times, involve appellee in penalties for failure to comply with certain regulations governing the transportation of perishable goods and livestock. It does not appear, however, that such is a necessary result nor that such results cannot be avoided by arrangement of train schedules. We are of the opinion that the record in this case does not establish that time consumed in complying with this order is so great as to amount to a regulation of interstate commerce or a direct burden upon it. The order does not purport to do so but was obviously promulgated to protect the [fol. 328] lives and health of citizens of this State engaged in appellee's business within the State.

As to finding No. 35, which involves cuts of cars taken across the river into Missouri, counsel for appellee earnestly argue that since there are no means of leaving a caboose at the State line, where it could be picked up on return, the only practical way in which compliance with the order of the commission may be had is to carry such caboose with the cut of cars into its yards in Missouri and attach it in Missouri, and bring it back over the bridges so as to comply with the order within the State. This, appellee contends, is, in practical effect, a regulation of the move-

ments of the appellee's trains in the State of Missouri, which is beyond the power of this State or its commission.

Numerous cases of the Supreme Court of the United States have been cited, none of which is entirely analogous on the facts to the case before us. In *Missouri Pacific Railway Co.* v. *Kansas, supra*, the Kansas Supreme Court ordered peremptory *mandamus* to compel the railroad to obey an order of the State Board of Railroad Commissioners requiring passenger train service to be established and maintained between Madison, Kansas and the Missouri State line on what is known as the Madison branch of the Missouri Pacific Railway. It was objected there that there were no terminal facilities at the State line between Kansas and Missouri and that to comply with the order the railroad would be required either to construct such facilities at that point or to carry its trains on through to and beyond Monteith Junction in the State of Missouri, where the Madison branch of the road intersects with the Missouri Pacific. The court pointed out, however, that the order of the Railroad Commission was to supply the passenger service to the State line, and the fact that the practical method of compliance was to run the train across into Missouri, neither rendered the order unreasonable nor a direct burden on interstate commerce. It was also pointed out that its charter provisions required that the railroad conduct passenger traffic along this branch so far as it lay within the State of Kansas.

We are unable to see that charter contract features distinguish that case from the one before us on the question of State power. A claim of duty resting upon a utility to render service, whether it arise out of its charter contract, an act of the General Assembly, or an order of an agency created by the General Assembly, based upon the police power of the State, involves the same ultimate question [fol. 329] whether the State's order, sought to be invoked, is an attempt to regulate interstate commerce or places a direct burden upon that commerce. In this case and in the *Missouri Pacific case* the same tests are to be applied in determining that question. In that case it was pointed out that the fact that the railroad extended its train operations into another State did not destroy the power of Kansas over its domestic commerce or bring local matters under the sway of Federal concern. That case, it will be noted, did not involve the character of order here under consider-

ation, which draws its validity, if it has such, from the power of the State to protect its citizens from danger of injury.

Atchison, Topeka and Santa Fe Railway Co. v. *LaPrade*, 2 Fed. Supp. 855, involved the train limit law of Arizona, which provided that no trains of more than 70 cars should be transported in the State. The act was by a three-judge court held to be an invasion of the interstate commerce clause of the Federal constitution. It was there pointed out that as trains from eighty to one hundred cars were required to be broken into trains of not more than seventy cars at the boundary of Arizona, and additional engines and crews provided during the trip across the State, to be again coupled into long trains after leaving the State, the Arizon act infringed upon a field which was exclusively under Federal control, and the absence of Federal regulation concerning them did not give power to the State to make rules which so necessarily controlled the conduct of interstate commerce; that the subject of the length of trains engaged in interstate traffic is national in character, requiring uniformity of regulation, which regulation is placed entirely under the control of Congress. Counsel for appellee argue that the case before us is analogous to the *LaPrade case*. This distinction, however, is to be noted: in the Arizona case the State requirements necessarily conflicted with Federal control of interstate commerce. Length of trains is a matter of national railroading, and the Arizona law was a direct attempt to control interstate commerce. There was no claim that it attempted to do anything else. It was not passed, as in the case before us, in the exercise of the State's police power and duty to protect the lives and safety of those engaged in operating the interstate trains.

It was pointed out in *Missouri Pacific Railroad Co.* v. *Norwood*, 283 U. S. 249, 75 L. ed. 1010, that in the absence of a clearly expressed purpose so to do, Congress will [fol. 330] not be held to have intended to prevent the exercise of the police power of the States. In *South Covington and Cincinnati Street Railway Co.* v. *Covington*, 235 U. S. 537, 59 L. ed. 350, it is pointed out that in numerous instances that court had sustained local enactments based on the exercise of police power in the interest of public health and safety, notwithstanding such regulations might incidentally or indirectly affect interstate commerce. This is

also pointed out in the *Minnesota rate cases*, where the subject is reviewed at length. *Simpson* v. *Shepard*, 230 U. S. 352, 57 L. ed. 1511.

Counsel for appellee cite the *Covington case* as analogous on the facts to the case before us. In that case a petition was filed by the railway company in the Kentucky State court to enjoin the city of Covington from enforcing an ordinance for the regulation and operation of the street-cars of the company. This ordinance contained numerous provisions. Among others, it required that no street-car be allowed to carry more than one-third greater number of passengers, over and above the number for which seats were provided; that the company run and operate cars in sufficient number to at all times reasonably accommodate the public, and that it maintain a temperature in its cars of at least 50 degrees Fahrenheit. Many of the cars of the company operated across the Ohio river over a bridge and into the city of Cincinnati, Ohio. Its traffic as to them was therefore interstate in character. The first two of the three provisions of the ordinance just referred to were held to be invalid on the ground that the necessary effect of such regulations was not only to determine the manner of carrying passengers in Covington and the number of cars to be used in so doing, but necessarily directed the number of cars to be run in Cincinnati and the manner of loading them there, where traffic was much more impeded and where the franchise privileges of the railway would not accommodate such increased number of cars. It was observed that if Covington could regulate these matters, Cincinnati could likewise, and interstate business might be impeded by the varying regulations. The provision of the ordinance regulating temperature to be maintained was held unreasonable and as practically impossible of performance. Other provisions of the ordinance were that the street-car company permit no one to ride on the rear platform unless the same is provided with suitable rail or barrier, and that no passenger be permitted to ride on the front platform unless a rail or barrier be provided separating them from the motorman and that the company at all times keep its cars thoroughly [fol. 331] clean and ventilated. These provisions were sustained as coming within the inherent police power of the State of Kentucky and it was held that it was competent for the State to provide for the safety and welfare of the

people notwithstanding such regulations might indirectly affect interstate commerce.

Appellee's counsel argue that the *Covington case* is direct authority for their claim that this order of the Commerce Commission is invalid. They point out that if cabooses are required on these interstate switching runs, appellee will necessarily have to transport them for some distance in Missouri, and Missouri could enact conflicting regulations. It will be noted that the factual situation in the *Covington case* was different, and was of much more difficulty. The franchise privileges of the street railway company in Cincinnati would not permit of compliance with the Covington ordinance and traffic conditions were much different. In the case before us appellee owns the switch yards on both sides of the river, into which the switching movements are taken. The additional burden in operation would thus principally be to provide places for and to attach these cabooses.

Does the fact, if such be a fact, that the only practical method of complying with the order would be to haul these cabooses into Missouri, of itself render the order of the commission invalid as a direct burden upon interstate commerce? In *New York, New Haven and Hartford Railroad Co.* v. *New York*, 165 U. S. 628, 41 L. ed. 853, the court was considering a New York statute regulating the heating of steam passenger cars, and directing that guards and guard posts be placed on railroad bridges and trestles of approaches thereto. It was contended that the statute was repugnant to the constitutional provision that Congress shall have power to regulate commerce among the several states, and also repugnant to the fourteenth amendment of the constitution requiring that no State shall deprive anyone of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. It was held that while laws of the State must yield to acts of Congress passed in execution of the powers conferred by the constitution, the mere grant to Congress of power to regulate commerce among the several states did not of itself and without legislation by Congress, impair the authority of states to establish such reasonable regulations as were appropriate for the protection of the health, lives and safety of its people. It was argued there, as here, that a conflict between State regulations in respect of heating passenger cars used in interstate commerce, would make

[fol. 332] safe and rapid transportation impossible, since the different States through which the trains were to travel might put into effect conflicting laws that would be a hardship upon travel. As to that objection the court replied: "These possible inconveniences cannot affect the question of power in each State to make such reasonable regulation for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character cannot be avoided so long as each State has plenary authority within its territorial limits to provide for the safety of the public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the States covering the same ground." It was in that case, as here, also contended that the statute was void in that it deprived the railroad company of its property without due process of law. This contention, however, was not sustained.

In *Atlantic Coast Line Railroad Co* v. *Georgia*, 234 U. S. 280, 58 L. ed. 1312, a statute of the State of Georgia required railroads to equip their locomotives, hauling interstate trains, with electric headlights. It was contended there, as here, that if Georgia could prescribe electric headlights, other States through which the road ran might require lights of a different sort, and the result of various adjustments would be to delay interstate traffic. The court in that case held that although applicable to interstate traffic, the act was not directed against interstate commerce but indirectly affected it, and that the State is not to be denied, because of such indirect effect, the power to protect life and property within its limits. To like effect is *Chicago, Rock Island and Pacific Railway Co.* v. *Arkansas*, *supra*.

While none of the cases cited or herein discussed are entirely analogous on the facts, we think those cases which consider State exercise of police power for the safety of citizens of the State, bear a stronger analogy to the case before us on the facts, than do those in which the laws or orders bore a closer identity with regulation of interstate traffic as such. It does not appear that this order was directed against interstate commerce, nor does it deny equal protection of the laws. On its face, it must be taken as not so directed, but as the exercise of the power and duty in-

herent in the State to protect its citizens. It purports on its face to apply to train movements within the State, and the fact that it does affect interstate shipments or cuts of cars [fol. 333] crossing from this State into the State of Missouri, results, in our opinion, under the facts of this case, in an incidental effect only upon interstate commerce.

Counsel for appellee say that the carrying out of this order would involve so large an expense as to affect its efficiency in the discharge of its duties as an interstate carrier. The question of expenses of labor involved and the purchase of cabooses was one of sharp dispute in the testimony. We are of the opinion that those expenses, on this record, are to be classed with those inconveniences referred to in the cases herein cited as not affecting the power of the State to impose the regulation, unless so clearly unreasonable as to be beyond State power. This record does not so indicate.

Counsel for appellee also contend that the statutes governing the powers and duties of the Commerce Commission do not give jurisdiction to enter the orders here complained of. They cite section 90 of the Utilities act, (Ill. Rev. Stat. 1941, p. 2524,) which declares the act shall not apply to interstate commerce, except when specifically so stated and in so far as permitted by paramount Federal authority. It is not claimed, as we understand the argument, that the commission may not make orders in furtherance of the police powers of the State, but that it may not enter such orders as affect interstate commerce. As hereinbefore stated, the order complained of does not purport to regulate interstate traffic and its effect upon it is but incidental. As was pointed out in *New York, New Haven and Hartford Railroad Co.* v. *New York, supra*, and *Chicago, Rock Island and Pacific Railway Co.* v. *Arkansas, supra*, and other cases herein cited, inconveniences and incidental influence on interstate commerce do not mark the measure of the power of the State to protect its citizens. Appellee's contention cannot be sustained.

That there is substantial danger to switchmen that can be avoided by these cabooses or shelter cars, seems clear. We are of the opinion that the order of the Commerce Commission lay within the police power of the State; that such power has been delegated to that commission, to protect the lives, health and welfare of those engaged in the work of switching the cars on the runs carried out by the appellee,

and that it was not beyond the power of the commission to enter finding No. 35 of its order requiring cabooses to the State line for those movements which crossed the bridges, [fol. 334] and that such regulations do not directly burden interstate commerce.

The reasons and authorities cited in determining the validity of finding and order No. 35 must apply in the main to finding and order No. 34, which requires cabooses on interyard movements within the State. Much that has already been said in the consideration of this case applies to finding and order No. 34 and need not be repeated.

It is also argued that it was error to admit the testimony of one Thomas, an investigator for the commission. This contention is without merit. By section 60 of the Public Utilities act the commission is empowered to, on its own motion, conduct investigations. It follows that the commission may hear the results of such investigations.

We are of the opinion that the order of the commission as a whole was a valid exercise of the police power and that the circuit court erred in setting that order aside. The judgment of the circuit court is reversed and the cause is remanded to that court with directions to confirm the order of the Commerce Commission.

Reversed and remanded, with directions.

[fols. 335-338] IN SUPREME COURT OF ILLINOIS

No. 26261

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative and Illinois Commerce Commission, Appellants,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Appellee

Appeal from Circuit Court, St. Clair County. 5073

JUDGMENT—March 16, 1942

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as

the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error.

Therefore, it is considered by the Court that for that error and others in the record and proceedings aforesaid the judgment of the Circuit Court of St. Clair county in this behalf rendered, Be Reversed, Annulled, Set Aside and Wholly for Nothing Esteemed, and this cause be remanded to the Circuit Court of St. Clair county with directions to confirm the order of the Commerce Commission.

And it is further considered by the Court that the said appellants recover of and from the said appellee costs by them in this behalf expended to be taxed, and that they have execution therefor.

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois, and Keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed the Seal of the said Supreme Court, in Springfield, in said State, this 24th day of June, A. D. 1942.

Edward F. Cullinane, Clerk pro tempore. (Seal.)

[fol. 339] IN SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR REHEARING BY DEFENDANT-APPELLEE—Filed March 30, 1942

May it Please the Court:

Your petitioner, Terminal Railroad Association of St. Louis, a corporation, defendant-appellee in the above cause, respectfully asks for a rehearing in said cause, in which the opinion of the Court was filed on March 16, 1942. In support of this petition defendant-appellee respectfully calls attention to, and states briefly, the points which it con-

tends have been overlooked or misapprehended by the Court.

[fol. 340] The Court's particular attention is directed to the fact that the opinion is in conflict with all controlling decisions of the Supreme Court of the United States and this Court with respect to the state legislation which (1) imposes a direct burden upon interstate commerce and (2) is prevented where Congress has occupied the field, whether the effect of the state legislation is direct or indirect, which principles are discussed under points III and IV, below, respectively.

I

In its original brief (pp. 29-34) appellee raised the point, which has been completely overlooked by the Court in its opinion, that the complaint filed in this cause is not sufficient to support the order of the Illinois Commerce Commission, and called attention to the case of A. & S. R. R. v. Ill. C. C., 316 Ill. 625, l. c. 630, wherein this Court held that while no particular form is prescribed there must be a statement of the things which are claimed to be wrong, sufficiently plain to put the carrier upon its defense, and this Court then stated "that the Commission cannot enter an order which is broader than the written complaint filed in the case."

In our original brief (p. 29), we called the Court's attention to the very brief allegations of the complaint, which limited the original unsafe condition to "reduced vertical and horizontal clearances."

We further called the Court's attention (Br., p. 31) to the findings of the Commission that other hazards and dangers existed not covered by the complaint, and which are mentioned in the second paragraph of the opinion of this Court. [fol. 341] We therefore contended that these other findings, upon which the order of the Commission was based, and upon which apparently the opinion of this Court is based, could not be considered under the limited allegations of the petition. We further called specific attention (Br., pp. 31-33) to the findings of the Commission and demonstrated that the only findings as to "reduced vertical and horizontal clearances" are in relation to the Eads and Merchants Bridges, the runs over which are covered by finding 35. We further called attention to the fact that there was no substantial evidence as to insufficient clearances except on the two bridges, and no substantial evidence as to insuffi-

cient clearances on the runs covered by finding 34; and further called the Court's attention to the general nature of the petition on the ground that it was so general in its allegations that a valid order could not be based upon it; particularly when the insufficiency of the petition was called to the attention of the Commission at the commencement of the hearings (Br., p. 3; Abs., p. 27; Add. Abs., pp. 2-5), and petitioner elected to stand by its petition.

Under point I of our argument (Br., pp. 27-28) we called attention to the decisions of this Court relative to the power and jurisdiction of the Commission. This Court in its opinion has overlooked the points raised by appellee relative to the complaint, as above set forth; has not passed upon the points raised, and has wholly overlooked and disregarded the decisions of this Court above referred to and the state of the record as above mentioned.

[fol. 342] II

This Court, in its opinion, has wholly misapprehended the position taken by us under point III of our argument (Br., pp. 34-41), wherein we contended that even if the General Assembly could have given jurisdiction of the subject matter of this cause to the Commission, yet the Commission by the statute creating it has no jurisdiction of the subject matter of this cause. This point was raised without regard to the federal questions presented. This Court, in its opinion, correctly states that all of the runs over the Eads and Merchants Bridges, covered by finding 35, were movements of interstate commerce, and that in all of the twenty transfer runs covered by finding 34, 98 per cent of merchandise carried was being moved in interstate commerce.

Appellants relied for jurisdiction on Sections 32, 50 and 61 of the Illinois Commerce Commission Act. These sections are general grants of authority and jurisdiction to the Commission, and in none of them is it specifically stated that they apply to interstate commerce.

We called attention (Br., p. 39) to section 90 of the act, which provided that neither the act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except when specifically so stated, and in so far as the same may be permitted under the provisions of the Constitution and laws of the United States.

In the authorities cited on pages 38 and 39 of our brief we clearly demonstrated that the Commission derives its [fol. 343] power solely from the statute, and that it has no power or jurisdiction unless it be by statute expressly conferred upon it. Our position was that by section 90 no jurisdiction was given to the Commission over interstate commerce under any circumstances, unless specifically granted by the act, and we demonstrated that no such specific jurisdiction had been conferred. That was the point, and the only point, that we raised under section 90, and we respectfully but vigorously submit that this Court, in its opinion, has entirely overlooked and misunderstood our position on this question. In the opinion, in referring to this argument as to section 90, this Court said:

"It is not claimed, as we understand the argument, that the commission may not make orders in furtherance of the police powers of the State, but that it may not enter such orders as affect interstate commerce. As hereinbefore stated, the order complained of does not purport to regulate interstate traffic, and its effect upon it is but incidental. As was pointed out in New York, New Haven and Hartford Railroad Co. v. New York, supra, and Chicago, Rock Island and Pacific Railway Co. v. Arkansas, supra, and other cases herein cited, inconveniences and incidental influence on interstate commerce do not mark the measure of the power of the state to protect its citizens. Appellee's contention cannot be sustained."

This statement wholly misapprehends the argument that we made. We did and do admit that the General Assembly could have conferred on the Commission power to make certain orders under the police power affecting interstate [fol. 344] commerce, provided interstate commerce was only incidentally affected and Congress had not taken possession of the field. But we did and do contend that under the decisions of this Court the Commission has no power to make any such orders, unless its power and jurisdiction to do so can be found within the confines of the act creating it. With the limitations of section 90, no such power and jurisdiction is conferred.

The Court states that the order does not purport to regulate interstate commerce, and impliedly holds that its effect must be determined from what it purports to do

and not from what actually results. Such a conclusion is contrary to the rules of law laid down in South Covington Ry. Co. v. Covington, 235 U. S. 537, quoted from on p. 50 of our brief; Southern Pac. R. R. Co. v. R. R. Commission, 10 F. Supp. 918, quoted from and discussed on pp. 51 to 55 of our brief; A. T. & S. F. Ry. Co. v. LaPrade, 2 F. Supp. 855, discussed and quoted on pp. 50 and 51 of our brief; Lemke v. Farmers' Grain Co., 258 U. S. 50, and Shafer v. Farmers' Grain Co., 268 U. S. 189, discussed on pp. 56 to 60 of our brief. It is also contrary to the decision of this Court in People v. Cross, 361 Ill. 405, and other rulings of this Court cited under point IV below.

We are confident that if the Court will again reexamine our original brief upon the subject covered by this point, it will be readily seen that our arguments have been misapprehended or overlooked, and that the effect of section 90 on this case has been inadvertently misapprehended by this Court.

[fol. 345] III

Even if the Commission purportedly has jurisdiction in this case under the Illinois statute, yet this Court, in its opinion, has misapprehended many decisions of the Supreme Court of the United States and has overlooked many other decisions of that Court under which the Commission order is invalid.

This Court in its opinion correctly states that all of the merchandise carried over the two bridges on the runs covered by finding 35 is being transported in interstate commerce; that 98 per cent of the merchandise carried on the inter-yard runs in Illinois covered by finding 34 is being transported in interstate commerce; that on the bridge runs the cabooses cannot be attached or disconnected at the state line, which is the middle of the river, but that as a practical proposition on both east-west and west-east movements the necessary effect of the order is to require appellee on east-west movements after they cross the state line to carry them across the river through the tunnel a mile in length, and a considerable distance further to a yard in Missouri, and that likewise on west-east movements, in order to comply with the order after the state line is crossed, the cabooses must be attached in the yards in Missouri, carried through the same tunnel in Missouri and across the bridge to the state line in order to be

attached to the runs while they are in Illinois. In fact, this Court, in its opinion, states that such facts are not disputed.

This Court, in its opinion, correctly states, following the decision of Mr. Justice Hughes in the Minnesota Rate Cases, 230 U. S. 352, 396, that if a state enactment imposes a direct burden on interstate commerce, it must fall whether [fol. 346] there is federal legislation on the question or not, and this Court has correctly stated that legislation passed by a state under the police power which only incidentally and indirectly affects interstate commerce is valid unless Congress has acted on the subject and thereby taken possession of the field. But this Court has entirely overlooked or misapprehended the applicable decisions of the United States Supreme Court on this subject.

Under the admitted facts, particularly as to the bridge runs covered by finding 35, there can be no question but that the enforcement of this order would be a direct burden on interstate commerce and would directly affect the same. This Court, in its opinion, says, in referring to this matter: "That such law is nevertheless valid unless its effect is to directly lay some burden or restriction on interstate commerce which would not otherwise exist." It has been and is our contention, particularly as to the bridge runs and also as to the inter-yard runs, that this order does lay a direct burden or restriction on interstate commerce which would not otherwise exist. Furthermore, it is not the law, as stated in the opinion, that so long as Congress does not occupy the field of regulation within the particular field, the state is empowered to make regulations within that field under its police powers. This statement is true only when such regulations do not directly affect, burden or restrict interstate commerce, and even then it is not true if Congress has taken possession of the field.

The main thing that this Court, in its opinion, has failed to apprehend and which has been overlooked by it is as to what constitutes a direct burden, interference, regulation or restriction on interstate commerce. The decision cited [fol. 347] and quoted from in the opinion, viz., Carter v. Carter Coal Co., 298 U. S. 238, clearly demonstrates this.

In support of its opinion this Court has cited Missouri Pac. Ry. Co. v. Kansas, 216 U. S. 262. We ask the Court particularly to read page 284 of that opinion. The order in the Kansas case did not require an interstate train to be

stopped—it required a local train to run from a point in Kansas to the state line as required by its charter. An examination of this opinion will clearly distinguish it.

In its opinion this Court has sought to distinguish the decision of the three-judge court in A. T. & S. F. Ry. Co. v. La Prade, 2 F. Supp. 855, discussed and quoted from in our brief on pages 49 and 50. The Court has overlooked the quotation from that opinion appearing in our brief, quoting with approval the Covington case, and other parts of the opinion, where it is clearly demonstrated that the three-judge court passed directly on the question now involved.

This Court, in its opinion, has entirely overlooked and does not mention the opinion of the three-judge court in Southern Pac. R. R. Co. v. R. R. Com., 10 F. Supp. 918, which is discussed and quoted from in our brief on pages 51-55. That was a case almost identical with the case at bar and resulted from an order of the California Commission requiring cabooses in the middle of trains of certain length. The practical effect of the order was that the railroad company either had to spend $6,700.00 for facilities at the state line or haul the cabooses to a division point in an adjoining state seventeen miles from the state line. The order was held therefore to be a direct burden on interstate commerce and invalid.

[fol. 348] As stated in the opinion, we do contend that the Covington case, 235 U. S. 537, is analogous to the case at bar. This case is discussed in the opinion, but the effect of it is misapprehended. In our original brief we discussed it at pages 45 to 49. The Supreme Court refused to sustain that part of the ordinance that provided for a minimum number of cars and the carrying of a maximum number of passengers, for the reason that, inasmuch as the cars went across the river to Cincinnati, the enforcement of these provisions of the ordinance covering all movements from Covington to Cincinnati and back would require the enforcement of the Kentucky ordinance in Cincinnati, Ohio. The Court sustained all of the provisions of the ordinance which could be enforced in Covington without necessarily applying to Cincinnati, and held invalid all its provisions which could not be enforced in Covington without necessarily being applied in Cincinnati. We particularly ask the Court to read this case carefully and especially the quotations appearing on pages 47 and 48 of our brief. In

discussing this case, this Court called attention to mention in the opinion of certain charter provisions of the railway company in Cincinnati. This Court has overlooked the fact that the decision was not based upon that fact. The Supreme Court refused to sustain these provisions of the ordinance because of the direct burden on interstate commerce, and because the practical effect of the order was to regulate the business of the street car company in Cincinnati, where the City of Covington had no jurisdiction. It is true that the Court did mention certain franchise provisions in the Cincinnati ordinance, but it did not pass upon the effect of these provisions and at the most only said that it was one of the facts to be considered. For the [fol. 349] convenience of the Court we quote a short paragraph from page 547 of the opinion in the Covington case, as follows:

"To comply with these regulations, the testimony shows, would require about one-half more than the present number of cars operated by the Company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges, held by the Company, or controlled by it, in that City. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation of the cars of this Company, are to be taken into view in determining the nature of the regulation here attempted, and whether it so directly burdens interstate commerce as to be beyond the power of the State."

Other applicable decisions of the United States Supreme Court which this Court has overlooked in its opinion are: Lemke v. Farmers' Grain Co., 258 U. S. 50; Shafer v. Farmers' Grain Co., 268 U. S. 189; Buck v. Kuykendall, 267 U. S. 307, and C. B. & Q. R. Co. v. R. R. Com., 237 U. S. 220.

Under all of these decisions the order, both as to the runs covered by finding 34 and those covered by finding 35, is wholly void, and all of these decisions have been either overlooked or misapprehended by this Court in its opinion. Other cases cited by the Court are either not applicable or the effect of them has been misapprehended, and if incidental expressions occur in them, particularly the early

cases, they have long since been overruled by the later cases upon which we rely.

[fol. 350] This Court in the early part of its opinion recognizes the fact that the question raised under this point is one of which the Supreme Court of the United States is the final arbiter; consequently, it must on this question look to the decisions of that Court for guidance. In its opinion this Court says:

"While none of the cases cited or herein discussed are entirely analogous on the facts, we think those cases which consider State exercise of police power for the safety of citizens of the State bear a stronger analogy to the case before us on the facts than do those in which the laws or orders bore a closer identity with regulation of interstate traffic as such. It does not appear that this order was directed against interstate commerce, nor does it deny equal protection of the laws. On its face it must be taken as not so directed, but as the exercise of the power and duty inherent in the State to protect its citizens. It purports on its face to apply to train movements within the State, and the fact that it does affect interstate shipments or cuts of cars crossing from this State into the State of Missouri results, in our opinion, under the facts of this case, in an incidental effect only upon interstate commerce."

If that paragraph of the opinion properly states the law, then the validity of our statutes depends upon what they appear or purport to be, or what they state on their face and not upon what actual results follow from their enforcement. Such cannot be and is not the law, and we respectfully submit that the Court in making this statement has misapprehended the fundamental principles under which the validity of statutes is determined. It is not a question [fol. 351] of what appears on the face or what is purported on the face, but it is a question of what actually results. In fact, this Court so held, on authority of South Covington, etc. R. Co. v. City of Covington, supra, in People v. Cross, 361 Ill. 405, l. c. 414, which is discussed under point IV below

The present decision is in conflict with Illinois Central R. Co. v. State of Illinois, 163 U. S. 142, 41 L. Ed. 107, reversing 143 Ill. 434. In that case this Court upheld an Illinois statute requiring all passenger trains to stop at certain

stations. The Supreme Court of the United States unanimously held that this was an "unconstitutional hindrance and obstruction of interstate commerce," and said that "the state can do nothing which will directly burden or impede the interstate traffic." In the instant case this Court, we respectfully submit, has fallen into the same error which the Supreme Court of the United States found it necessary to correct in the Illinois Central case.

We therefore respectfully but most vigorously ask the Court to grant a rehearing in order that the matter covered under this point of our petition may be again studied and the applicable decisions considered in order that the true test may be applied to them, and we are confident that if that is done the Commission order, as to runs covered by both findings 34 and 35, will be declared to be invalid, because it is a direct burden on interstate commerce.

IV

This Court, in its opinion, has wholly overlooked and has failed to pass upon the point raised in our brief (pp. 63-77) to the effect that where Congress has taken charge of the [fol. 352] field, a state cannot legislate in that field, even though the effect upon interstate commerce is indirect and even though Congress has not legislated as to the particular matters involved. The whole question is whether Congress has taken possession of the field, and it is immaterial then whether it has legislated concerning a particular matter within the field. The whole test in this situation is whether or not Congress has occupied the entire field covered by the particular act. We have pointed out, and the Court so held in its opinion, that where Congress has not legislated as to the particular field, a state may legislate if the effect upon interstate commerce is indirect and does not constitute a direct burden or restriction thereon, but under such circumstances cannot legislate where there is created a direct effect, burden or restriction on interstate commerce.

One of the leading cases is Penn. R. R. Co. v. Public Service Commission, 250 U. S. 566, quoted from on page 64 of our brief, where the Supreme Court held that Congress having taken charge of all matters connected with the construction of cabooses and mail cars, the states were powerless to legislate. The logical result of this decision is that Congress has taken full jurisdiction of the matter of ca-

boosses, including their construction, equipment, where they shall be placed in the train and whether they shall be placed at all on trains. The dissenting opinion of Mr. Justice Clark (p. 570) accepts this construction of the majority opinion. It is immaterial whether the Interstate Commerce Commission has issued regulations as to when they should be used, for Congress has taken possession of the entire field and placed the administration of it in the Commission. [fol. 353] If a state cannot say what safety provisions shall be made on end cars, as held in the Pennsylvania case, then it cannot require a particular type of car to be placed on the end of trains. To the same effect is the La Prade case, supra, and the Southern Pacific case, supra.

In Southern Ry. Co. v. R. R. Comm. Ind., 236 U. S. 439, 59 L. Ed. 661, the Court held that the test in determining whether Congress has occupied the field is not whether state legislation conflicts with the details of federal law or supplements it. Even if the state's regulations under the police power would affect interstate commerce only incidentally, the congressional occupation of the field prevented state legislation on the subject. See, also, St. Louis Iron Mountain & Southern Railway v. Edwards, 227 U. S. 265, 57 L. Ed. 506, and Erie R. R. v. New York, 233 U. S. 671, 58 L. Ed. 1149. Whatever must be implied in the congressional action is of equal force with that which is expressly treated, Savage v. Jones, 225 U. S. 501, 56 L. Ed. 1182.

The point was conclusively settled in Napier v. Atlantic Coast Line, 272 U. S. 605, 71 L. Ed. 432, a case dealing with the exclusiveness of the Boiler Inspection Act. We call particular attention to that part of the opinion on page 439.

To the same effect are: Staten Island Rapid Transit Co. v. P. S. C., 16 F. (2d) 313; Southern R. Co. v. U. S., 222 U. S. 20, 56 L. Ed. 72; Texas & Pacific R. Co. v. Rigsby, 241 U. S. 33, 60 L. Ed. 874; Northern Pacific R. Co. v. Washington, 222 U. S. 370, 56 L. Ed. 237; Erie R. Co. v. New York, 233 U. S. 671, 58 L. Ed. 1149; Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87, 70 L. Ed. 482; Missouri [fol. 354] Pacific R. Co. v. Porter, 273 U. S. 341, 71 L. Ed. 672; C. & W. C. R. Co. v. Varnville F. Co., 237 U. S. 597, 59 L. Ed. 1137; Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314; Prigg v. Pennsylvania, 10 L. Ed. 1060; Houston v. Moore, 5 L. Ed. 19, as well as the cases heretofore cited.

A case on all fours with the present case, when considered in the light of Pennsylvania R. Co. v. Public Service Commission, supra, is Whish v. P. S. C., 205 App. Div. 756, 200 N. Y. S. 282 (affirmed 240 N. Y. 677, 148 N. E. 755). Upon the principle here discussed this case held invalid a New York statute requiring vestibule cabs on locomotives used in interstate commerce. The Court said that a state has no power to fill what it may regard as an hiatus left by Congress and the Interstate Commerce Commission.

The present decision is in conflict with previous decisions of this Court. In Staley v. Illinois Central R. Co., 268 Ill. 356, this Court, citing Southern Ry. Co. v. R. R. Comm. Ind., supra, and Prigg v. Pennsylvania, supra, held that the State of Illinois could not legislate on compensation for injuries to railroad employes for the reason that the subject is exclusively governed by the Federal Employers' Liability Act. It is also in conflict with decisions on similar grounds in People v. Illinois Central R. Co., 324 Ill. 591; St. Louis C. R. Co. v. Blumberg, 325 Ill. 387, and Gamble-Robinson Co. v. U. P. R. Co., 262 Ill. 400.

This Court in People v. Cross Co., 361 Ill. 405, l. c. 414, recognized the principle above stated, and on the authority of South Covington etc. Ry. Co. v. City of Covington, supra, said that whether an act or acts constitute "the carrying on of interestate commerce is to be determined by what is actually done."

[fol. 355] In our brief (pp. 64-75) we demonstrated that Congress had taken charge of various fields relating to railroads by several of its acts.

The limits of this petition for rehearing will not permit us to repeat in detail the arguments in support of this point. This Court entirely overlooked this point in its opinion, and we believe that a rereading of the pages of our argument above cited and a reading of the additional cases cited herein will clearly convince the Court that we are right in our contention on this point. This point and the preceding point III clearly illustrate that the State of Illinois is wholly without power to legislate on the matter of railroad cabooses, and, therefore, that this Court's decision is erroneous.

V

In our brief and argument on page 60, and again from pages 77 to 91, we raised the point that the order of the

Commission as to all the runs is unreasonable because of the exorbitant expense required in order to comply with it. Such expense being exorbitant when compared with the benefits accruing, then, consequently, to enforce the order would derpive appellee of its property without due process of law, in violation of the State and Federal Constitutions. This Court, in its opinion, after conceding that the delay on each run would be, according to the testimony, from 11 to 40 minutes, said:

"Counsel for appellee say that the carrying out of this order would involve so large an expense as to effect its efficiency in the discharge of its duties as an interstate carrier. The question of expenses of labor involved and the pur-[fol. 356] chase of cabooses was one of sharp dispute in the testimony. We are of the opinion that those expenses, on this record, are to be classed with those inconveniences referred to in the cases herein cited as not affecting the power of the state to impose the regulation, unless so clearly unreasonable as to be beyond state power. This record does not so indicate."

Witnesses for appellee testified (Abs., 114) that to put this order into effect would cost approximately $150,000 for new cabooses and $250,000 annually on account of added expense due to delays in switching, and that the added expense for each switching run would be $10.00. Appellant's witness testified (Br., p. 86) that the initial cost of cabooses would be $44,000, and the extra annual expense of wages would be $62,000. For the purpose of considering this point, it is immaterial which figure is taken.

In its one paragraph disposing of this contention, as above quoted, this Court has overlooked the case of Colorado v. U. S., 271 U. S. 153, cited and quoted from on pages 59 and 60 of our brief; Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613, cited and quoted from on page 79 of our brief; and Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, to the effect that "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." This Court has also overlooked the long list of cases cited in support of this position on page 80 of our brief. In doing so, this Court has

also overlooked the case of Great Northern Ry. v. Minnesota, 238 U. S. 340, to the effect that any act requiring the [fol. 357] expenditure of money upon the part of a railroad company involving the taking of its property, and the question of whether this is done with or without due process of law depends upon the special circumstances.

The Court has also overlooked the case of State of Washington ex rel. Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510, where the Court held that an order of the Oregon Public Service Commission requiring the making of track connections, estimated by the railroad company to cost $21,000 and by the Commission to cost $7,000, would deprive the railroad company of its property without due process of law. To the same effect is the case of Wisconsin M. & P. R. Co. v. Jacobson, 119 U. S. 287, commented upon and quoted from on pages 81 to 83 of our brief.

The substance of these cases is that where the burden cast upon the carrier is out of all proportion to the public benefits to be derived, the act of the state must be set aside as constituting a taking of property without due process of law, even though the amount of such burden is relatively small when actually measured in dollars, and that the unreasonable expense to secure a result desired will constitute a taking of property without due process of law.

The Court, in its opinion, has also overlooked the case of C., B. & Q. R. R. Co. v. Commerce Com., 364 Ill. 213, l. c. 221, 222, to the effect that even if a hazard is shown to exist, if it cannot be remedied without unreasonable expense or imposing onerous conditions, then an order that would do that would be void.

We have shown that only one man would ride in a caboose [fol. 358] at any time, and that he would use the caboose only about one-eighth of the time he was at work; at all other times he would be exposed to all of the hazards found to exist by the Commission. The evidence in relation to this situation is abstracted in our brief (pp. 85 to 90) and, of course, will not be repeated here.

We respectfully submit that this Court, in its opinion, has wholly misapprehended our position on this point, and has not given consideration to the law concerning due process as set forth in our original brief and argument, and as briefly reviewed above.

VI

Under point VI (p. 91 of our original Brief) we set up a point that the Commission order was unreasonable as to the runs covered by finding 34. This point was raised without regard to the federal questions involved, and without regard to the questions of jurisdiction. We again ask the Court to read the one page of argument (pp. 91-92) in support of this proposition, together with the facts therein referred to, briefly summarized in our original brief (pp. 85 to 90).

This Court has wholly failed to pass upon this proposition, and we submit that a careful reading of this testimony as abstracted and as summarized in the brief will demonstrate that, laying all other questions aside, the order of the Commission is unreasonable and, therefore, void, and that a rehearing of this case would demonstrate the truth of that statement.

[fol. 359]

VII

This Court in its opinion repeatedly states that the petition in this case asked for the equipping of these runs with cabooses or shelter cars. The petition mentioned only caboose cars (Abs. p. 2). The order of the Commission (Abs., pp. 16, 17) did not require cabooses or shelter cars, as recited by the Court in its opinion, but required the furnishing, maintenance and operation of caboose cars on transfer, delivery and industrial runs set forth in both findings 34 and 35. ("Caboose cars" are described and their size and manner of construction are set forth in Sec. 183, Chapter 114, Ill. R. S. State Bar Ass'n Ed.) While this statute does not apply to switching movement, it does demonstrate what a caboose is under Illinois law. Leaving all other questions out of consideration, the Commission had no power or jurisdiction whatever to designate the kind of cars that should be used. That is a matter which is wholly up to the Interstate Commerce Commission. This was held in Penn. R. R. Co. v. Public Service Com., 250 U. S. 566, discussed and quoted from on pp. 63 and 64 of our brief and discussed under point IV of this petition for rehearing. While this matter does not go to the merits of the controversy, it does show the void nature of the order in that the Commission has attempted to prescribe the kind of cars that should be used when that matter was wholly beyond its jurisdiction.

We also discussed this matter on p. 45 of our brief, and in our brief raised the technical question of the validity of the order in the shape it is in. This Court, in its opinion, wholly overlooked this point, which, even though technical, is fatal to the validity of the order.

[fol. 360]

VIII

On p. 92 of our brief we raised the question that the order of the Commission is void because there are no separate findings as to the different runs. We showed that each of these runs is separate and contended that in order to sustain an order as to each of the runs there must necessarily, under the statute as construed by the Court, be separate findings as to each run sufficient to justify the order as to such particular run. This Court overlooked this point and did not pass upon the same in its opinion. We submit that twenty inter-yard runs and a like number of bridge runs cannot all be included in one lump order and without any findings as to each particular run.

Under the decisions cited under point I of our argument (Br., p. 27), such findings as to each separate run are necessary in order to make a valid order applicable to that run.

IX

In our original brief (pp. 92 to 94) we raised the question that it was error to permit the witness Thomas, an employe of the Commission, to be called as a Commission witness, and that it was error not to strike his testimony from the record. This Court disposes of this contention in the next to the last paragraph of its opinion on the ground that by Section 60 of the Public Utilities Act, the Commission being empowered on its own motion to conduct investigations, the Commission may hear the results of such investigations. The point we raised is that this is a civil case to which the rulings as to civil cases apply, and that there is no rule of law in Illinois that will permit the Court to call a court wit-

[fol. 361]

ness in a civil case. Thomas was called as a court witness and not by the petitioner. This Court overlooked this position that we took and decided this matter on another principle wholly irrelevant to the point raised by us.

Conclusion

We respectfully submit that the decision in this case is patently wrong, and that this Court has overlooked and mis-

apprehended our points as specifically above set forth. We believe that, if given the opportunity so to do, we can by further brief and argument (and by oral argument, if this Court will permit) show to this Honorable Court that the judgment of the Circuit Court ought to be affirmed instead of reversed.

We therefore respectfully ask that this petition for rehearing may be granted in order that we may have such opportunity.

Respectfully submitted, Kramer, Campbell, Costello & Wiechert, Attorneys for Terminal Railroad Association of St. Louis, Defendant-Appellee. Carleton S. Hadley, Walter N. Davis, Louis A. McKeown, of Counsel.

[fols. 362-363] IN SUPREME COURT OF ILLINOIS

ORDER DENYING PETITION FOR REHEARING—May 12, 1942

Now on this day the Court having duly considered the petition for rehearing and being fully advised in the premises, doth overrule and deny the petition for rehearing.

[fol. 364] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS TO THE SUPREME COURT OF THE UNITED STATES —Filed June 11, 1942

To the Honorable, the Chief Justice of the Supreme Court of the State of Illinois:

Your petitioner, Terminal Railroad Association of St. Louis, a corporation, originally appellee and now appellant herein, respectfully shows:

1. On March 4, 1938, Brotherhood of Railroad Trainmen, Richard Abram, Chairman and State Legislative Representative, originally appellant and now appellee herein, filed

with appellee, Illinois Commerce Commission, originally appellant and now appellee herein, its petition, alleging that caboose cars were necessary to protect the life, health and safety of switchmen on transfer runs of appellant in and about East St. Louis, Illinois; that appellant had failed to furnish such caboose cars; and praying that an order be [fol. 365] entered requiring appellant to provide such caboose cars on such transfer runs. Jurisdiction of the matter involved in the petition was claimed under and by virtue of Sec. 32 (Ill. Rev. Stat. 1941, p. 2503), Sec. 50 (Ill. Rev. Stat. 1941, p. 2508), and Sec. 60 (Ill. Rev. Stat. 1941, p. 2512) of the Illinois Commerce Commission Act.

Appellant, in addition to the Federal Constitutional questions raised, claimed that no such jurisdiction existed in the Commission because of the provisions of Sec. 90 of the Illinois Commerce Commission Act (Ill. Rev. Stat. 1941, p. 2524).

2. Appellant filed its answer to said petition, denying the allegations thereof, and expressly denying that the Illinois Commerce Commission had any power, right or jurisdiction to enter any order in regard to the subject matter of the petition so far as any movements in interstate commerce were concerned. The answer also expressly stated that so far as interstate movements of trains or cuts of cars are concerned, the Commission had no power, jurisdiction or authority to enter any order requiring cabooses on interstate runs between the State of Illinois and the State of Missouri, and that such question of jurisdiction was raised so far as any interstate runs or movements were concerned.

At various other times during the proceedings before the Illinois Commerce Commission, as will be more fully detailed in the statement in support of the jurisdiction of the Supreme Court of the United States to be filed herein, appellant, by motions, objections to evidence, offers of proof and contentions made on the trial, appropriately raised questions that the Illinois Commerce Commission had no [fol. 366] jurisdiction of the proceeding or to enter its order hereinafter set forth, alleging that such jurisdiction was denied to the Commission, and that any order entered by it in the premises would be invalid, repugnant to and in contravention of the provisions of the Constitution of the United States of America, and particularly the interstate

commerce provisions of said Constitution contained in Sec. 8 of Article I thereof, and the due process of law provisions contained in Amendment XIV to said Constitution. The Supreme Court of Illinois passed upon all of these questions.

3. The appellee, Illinois Commerce Commission, on February 1, 1940, entered its findings and order in this cause. The Commission, by its Finding 34, found that it was reasonable to require appellant to furnish, maintain and operate caboose cars throughout the year on its transfer, delivery and industrial runs, twenty in number, between certain of its yards located in the State of Illinois; and likewise, by its Finding 35 found that it was reasonable to require appellant to furnish, maintain and operate caboose cars throughout the year on its transfer or delivery runs in the State of Illinois on all runs over the Eads and Merchants Bridges crossing the Mississippi River between the States of Illinois and Missouri. Based upon such findings, an order was issued that cabooses as to runs mentioned in Finding 34 be furnished, maintained and operated within sixty days of the date of the service of the order; and as to the runs set forth in Finding 35, they be furnished, maintained and operated within thirty days after the date of the service of the order.

[fol. 367] Said Commission by its order further expressly denied the motion of appellant to dismiss the proceeding for want of jurisdiction. Of the five members of the Commission, three voted in favor of the findings and order of the Commission and one Commissioner dissented as to the bridge runs covered by Finding 35, on the ground that the order of the Commission based on Finding 35 was an attempt, improperly and unlawfully, to regulate interstate commerce and therefore was beyond the jurisdiction of the Commission.

4. Appellant complied with the statutory requirements relative to an application for rehearing before the Illinois Commerce Commission, which application was denied by the Commission; whereupon, in accordance with the statute of the State of Illinois, appellant appealed to the Circuit Court of St. Clair County, Illinois, where the cause, as provided by statute, was heard on the record made before the Commission.

On July 26, 1940, the Circuit Court of St. Clair County, Illinois, passing only upon that portion of the order requiring caboose cars on runs across the two bridges, found that that portion of the order of the Commission requiring cabooses to be attached to trains moving between the States of Illinois and Missouri over the Eads and Merchants Bridges was an interference with interstate commerce, and was beyond the jurisdiction of the Illinois Commerce Commission. The Circuit Court further found that under the decision rendered in the case of Brotherhood of Railroad Trainmen v. Elgin, Joliet & Eastern Ry. Co., 374 Ill. 60, the power of the Circuit Court was limited to either affirming in its entirety or setting aside in its entirety the order of the Commission. The Circuit Court, under the last men-[fol. 368] tioned decision, did not pass upon any other questions in the case for the reason that under said decision if the order of the Commission was erroneous in one respect it must necessarily be set aside, regardless of its soundness and validity in other particulars. The Circuit Court thereupon ordered and adjudged that the said order and decision of the said Illinois Commerce Commission in said cause be and the same was reversed and set aside.

5. Appellees, in accordance with the statutes of the State of Illinois, duly perfected an appeal from said order and judgment of the Circuit Court to the Supreme Court of the State of Illinois. Appellant filed no Assignments of Error in the Supreme Court of the State of Illinois, because it was appellee in that Court, having prevailed in the Circuit Court. Appellant did, however, under the decision of the Supreme Court of Illinois in People v. Bradford, 372 Ill. 63, l.c. 56-66, avail itself of the right, without cross appeal or cross error, to sustain the judgment in its favor on grounds other than the one passed upon by the Circuit Court; and the Supreme Court of Illinois passed upon all of these grounds.

6. The undisputed evidence in the record (and in its opinion the Supreme Court of the State of Illinois so found) shows that all of the merchandise carried over the two bridges on the bridge runs covered by Finding 35 was transported in interstate commerce; that 98% of the merchandise carried in the inter-yard runs in Illinois covered by Finding 35 was transported in interstate commerce; that on the bridge runs cabooses cannot be attached or disconnected at

[fol. 369] the State line, which is the middle of the river, but that as a practical proposition on both east-west and west-east movements the necessary effect of the order is to require appellant on east-west movements after they cross the State line to carry them across the river (and as to the Eads Bridge, through the tunnel a mile in length), and a considerable distance further to a yard in Missouri; and that likewise on the west-east movements, in order to comply with the order after the State line is crossed, the cabooses must be attached in yards in Missouri (and as to the Eads Bridge, carried through the same tunnel in Missouri), and half way across the bridge to the State line in order that cabooses may be on the runs while they are in the State of Illinois. In other words, the order of the Commission not only directly impeded, hindered and delayed interstate commerce, but also required compliance in Missouri, where the Illinois Commerce Commission had no power, jurisdiction or authority.

The evidence for appellant showed that in order to comply with the order of the Commission, appellant must necessarily expend $150,000 for new cabooses and $250,000 annually on account of added expense, due to delays in switching movements, and that the added expense for each switching run would be $10.00. Appellees' testimony was that the initial cost of the cabooses would be $44,000 and the extra annual expense would be $62,000. The Supreme Court of the State of Illinois in its opinion found that as to each run the amount of delay in each movement is in conflict, ranging from eleven minutes to forty minutes per movement. The evidence further showed that if cabooses were attached, the cabooses would only be used by one employe, [fol. 370] and by that employe for only from one-sixth to one-eighth of the time that he worked; that during the balance of his working period he would be exposed to the same hazards, and in fact additional hazards.

Appellant will in its statement in support of the jurisdiction of the Supreme Court of the United States, to be filed herewith, set forth in further detail the evidentiary facts as contained in the record and as found by the Supreme Court of the State of Illinois.

7. On March 16, 1942, the Supreme Court of the State of Illinois, passing not only on the one question decided by the Circuit Court of St. Clair County, Illinois, but also on

the other questions involved in the case, handed down an opinion reversing the judgment of the Circuit Court and remanding the cause to the Circuit Court, with directions to confirm the order of the Illinois Commerce Commission.

8. Within the time provided by the Rules of the Supreme Court of the State of Illinois, appellant filed its petition for rehearing in said Court, which said petition for rehearing was by the Supreme Court of the State of Illinois denied on May 12, 1942; whereupon the said judgment of the Supreme Court of the State of Illinois became the final judgment of that Court. The Supreme Court of the State of Illinois is the highest court of the State of Illinois in which a decision in this suit could be had.

9. In the said Supreme Court of the State of Illinois, there was drawn in question the validity of the said order of the Illinois Commerce Commission, which the Supreme Court of the United States has held is a State statute within the meaning of the Constitution of the United States and the Acts of Congress regulating the jurisdiction of the Supreme [fol. 371] Court of the United States, on the ground of its being repugnant to the Constitution and laws of the United States, and the decision of the Supreme Court of the State of Illinois was in favor of the validity of such order and consequently may be reviewed by the Supreme Court of the United States on appeal.

The validity of said order of the Illinois Commerce Commission, so far as substantial federal questions and its repugnance to the Constitution of the United States are concerned, was drawn in question and considered and decided by the Supreme Court of the State of Illinois, in the following respects:

a. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois, that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 35 were concerned, viz: the bridge runs, for the reason that even if Congress had not legislated upon the subject, the effect of the order as to such runs was and is a direct burden on interstate commerce and directly burdens or impedes interstate traffic, or impairs the usefulness of facilities for such

traffic; and because said order as a practical proposition compelled a like compliance in the State of Missouri, where the Illinois Commerce Commission had no power, jurisdiction or authority. Appellant contended that such a direct burden on interstate commerce was repugnant to the interstate commerce clause of the Constitution of the United States, viz: Sec. 8 of Article I thereof. The Supreme Court of Illinois directly passed on this question in favor of the validity of the order of the Illinois Commerce Commission.

[fol. 372] b. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois, that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 34 were concerned, viz: the inter-yard runs in Illinois which contained 98% of interstate freight, for the reason that even if Congress had not legislated upon the subject, the effect of the order as to such runs was and is a direct burden on interstate commerce and directly burdens or impedes interstate traffic, or impairs the usefulness of facilities for such traffic. Appellant contended that such a direct burden on interstate commerce was repugnant to the interstate commerce clause of the Constitution of the United States, viz: Sec. 8 of Article I thereof. The Supreme Court of Illinois directly passed on this question in favor of the validity of the order of the Illinois Commerce Commission.

c. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois, that Congress had taken charge of the field relative to the furnishing, maintenance and operation of caboose cars as to runs mentioned in both Findings 34 and 35, and that inasmuch as Congress had taken charge of the field by appropriate legislation a State cannot legislate in that field even though the effect upon interstate commerce is indirect, and even though Congress has not legislated as to the particular matters involved, the question being whether Congress has taken possession of the field, it being immaterial then whether or not it has legislated concerning a particular matter within the field. Appellant contended that for [fol. 373] this reason the order of the Illinois Commerce Commission was invalid on the ground that it was repug-

nant to the Constitution of the United States, and particularly repugnant to the interstate commerce provision of said Constitution contained in Sec. 8 of Article I thereof. The Supreme Court of the State of Illinois passed on this contention in favor of the validity of the order of the Illinois Commerce Commission as against the grounds and contentions set forth, and held that the said order was not repugnant to the commerce clause of the Constitution of the United States.

d. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois that the order of the Illinois Commerce Commission as to all of the transfer runs is unreasonable because of the exorbitant expense required in order to comply with it. Appellant further contended that such expense of compliance with the order was so exorbitant when compared with the benefits accruing therefrom, and the said benefits were so disproportionate to the cost thereof, that consequently the enforcement of the order would deprive appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. Appellant further contended in the Supreme Court of Illinois, for the reasons set forth in this paragraph, that the order of the Illinois Commerce Commission was invalid for the reason that it was repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto. The Supreme Court of the State of Illinois decided said contention in favor of the validity of the order of said Illinois Commerce Commission, and decided and found that such order was not repugnant to the 14th amendment to the Constitution [fol. 374] of the United States.

10. Wherefore, appellant avers that in the Supreme Court of the State of Illinois there was drawn in question the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution of the United States and the decision in the said Supreme Court of the State of Illinois was in favor of its validity, and that therefore, under the provisions of Sec. 237a of the Judicial Code, as amended (Sec. 344, Title 28, U. S. C. A.), and Secs. 861a and 861b (U. S. C. A. Title 28 Supp.) of the Judicial Code, the Supreme Court of the United States has

full power and jurisdiction to review by direct appeal the final judgment of the Supreme Court of the State of Illinois rendered in this cause,

11. The errors upon which your petitioner (appellant herein) claims to be entitled to an appeal and to a reversal of the said final judgment of the Supreme Court of the State of Illinois are more fully set out in the assignment of errors filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement in support of the jurisdiction of the Supreme Court of the United States of this appeal, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, considering itself aggrieved by the final decision of the Supreme Court of the State of Illinois in the above entitled cause, your petitioner (appellant herein) prays that an appeal be allowed to the Supreme Court of the United States herein, in order that the decision and final judgment of the Supreme Court of the State of Illinois may be examined and reviewed by that Court, and further prays that upon such appeal being allowed, and upon such [fols. 375-376] consideration and review thereof by the Supreme Court of the United States, the decision and final judgment of the Supreme Court of the State of Illinois may be reversed and judgment rendered in favor of appellant and for costs; and that such other orders may be entered herein by the Supreme Court of the United States as to it shall seem meet and proper, and as to law and justice may appertain.

Petitioner (appellant herein) also prays that a transcript of the records, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Illinois, under his hand and the seal of this Court, may be sent to the Supreme Court of the United States in manner and form and within the time as provided by law.

Petitioner (appellant herein) further prays that an order be entered fixing the amount of the bond to be filed by appellant and for the approval thereof, and that upon the execution and filing of a bond as provided by said order, the said bond shall operate as a supersedeas in this proceeding; and that an order shall be entered staying all proceedings in said cause and staying the issue of man-

date therein from the Supreme Court of the State of Illinois until this cause has been finally disposed of by the Supreme Court of the United States.

All of which is respectfully asked and prayed for.

Bruce A. Campbell, Rudolph J. Kramer, Carleton S. Hadley, Walter N. Davis, Louis E. McKeown, Counsel for Petitioner (Appellant herein) Terminal Railroad Association of St. Louis.

[fol. 377] In Supreme Court of the United States

[Title omitted]

Assignment of Errors—Filed June 11, 1942

Now comes Terminal Railroad Association of St. Louis, appellant in the above cause, and assigns the following errors in the record and proceedings in the said case:

1. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order in question of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States so far as the runs described in Finding 35 were concerned, viz: the bridge runs; and in holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was not a direct burden on interstate commerce and did not directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic; and in holding, deciding and determining that the necessary effect of said order as to said runs was not directly to burden interstate commerce by requiring a like compliance in the State of Missouri, where the Illinois Commerce Commission has no power, jurisdiction or authority; and in holding, deciding and adjudging that such a burden on interstate commerce was not repugnant to the interstate commerce clause of the Constitution of the United States, viz: Section 8 of Article I thereof.

2. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 35

were concerned, viz: the bridge runs; and in not holding, [fol. 378] deciding and adjudging that even if Congress had not legislated upon the subject the effect of the order as to such runs was and is a direct burden on interstate commerce and directly burdens or impedes interstate traffic or impairs the usefulness of facilities for such traffic; and in not holding, deciding and determining that said order, as a practical proposition, created a direct burden on interstate commerce by requiring a like compliance in the State of Missouri, where the Illinois Commerce Commission had no power, jurisdiction or authority; and in not holding, deciding and adjudging that such a burden on interstate commerce was repugnant to the interstate commerce clause of the Constitution of the United States, viz: Section 8 of Article I thereof.

3. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States so far as the runs described in Finding 34 were concerned, viz: the inter-yard runs in Illinois, which contained 98% of interstate freight; and in not holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was not a direct burden on interstate commerce and did not directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic; and in holding, deciding and adjudging that such a burden on interstate commerce was not repugnant to the interstate commerce clause of the Constitution of the United States, viz: Section 8 of Article I thereof.

4. The Supreme Court of the State of Illinois erred in not holding, deciding and adjudging that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 34 were concerned, viz: the inter-yard runs in Illinois, which contained 98% of interstate freight; and in not holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was and is a direct burden on interstate commerce and directly burdens or impedes interstate traffic or impairs the usefulness of facilities for such traffic; and in not holding, deciding and adjudging that such [fol. 379] a burden on interstate commerce was repugnant

to the Constitution of the United States, viz: Section 8 of Article I thereof.

5. The Supreme Court of the State of Illinois erred in holding that Congress had not taken charge of the field relative to the furnishing, maintenance and operation of caboose cars as to runs mentioned in both Findings 34 and 35; and in holding, deciding and adjudging that the State could legislate in the field even though the effect upon interstate commerce was indirect, and even though Congress had not legislated as to the particular matters involved, and under such circumstances, in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and was not repugnant to the interstate commerce provisions of said Constitution, contained in Section 8 of Article I thereof.

6. The Supreme Court of the State of Illinois erred in not holding, deciding and adjudging that Congress had taken charge of the field relative to the furnishing, maintenance and operation of caboose cars as to all of the runs mentioned in both Finding 34 and 35, and that therefore, inasmuch as Congress had taken charge of the field by appropriate legislation, the State of Illinois could not legislate in that field, even though the effect upon interstate commerce was indirect, and even though Congress had not legislated as to the particular matters involved; and in not holding, deciding and adjudging that for these reasons the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States, and particularly repugnant to the interstate commerce provisions of said Constitution contained in Section 8 of Article I thereof.

7. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order of the Illinois Commerce Commission as to all of the transfer runs was not unreasonable because of the exorbitant expense required in order to comply with it, and in holding that such expense of compliance with the order was not so exorbitant when compared with the benefits accruing therefrom, nor were the said benefits so disproportionate to the cost thereof that the enforcement of the order would not deprive appellant of its property without due process of law, in violation [fol. 380] of the 14th Amendment to the Constitution of the

United States, and in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto.

8. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission as to all of the transfer runs was unreasonable and arbitrary because of the exorbitant expense required in order to comply with it; in not holding that such expense of compliance with the order was not exorbitant when compared with the benefits accruing therefrom and the said benefits so disproportionate to the cost thereof that consequently the enforcement of the order would deprive appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States; and in not holding, deciding and adjudging, for the reasons set forth in this assignment of errors, that the order of the Illinois Commerce Commission was invalid for the reason that it was repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, by depriving appellant of its property without due process of law.

9. The Supreme Court of the State of Illinois erred in holding that the said order of the Illinois Commerce Commission was not repugnant to the interstate commerce clause of the Constitution of the United States contained in Section 8 of Article I thereof.

10. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission was invalid and repugnant to the interstate commerce clause of the Constitution of the United States contained in Section 8 of Article I thereof.

11. The Supreme Court of the State of Illinois erred in holding that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, prohibiting a State from depriving a person of his property without due process of law.

12. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Com-

[fols. 381-382] mission was invalid and repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, for the reason that said order deprives appellant of its property without due process of law.

13. The Supreme Court of the State of Illinois erred in reversing the judgment of the Circuit Court of St. Clair County, Illinois, and in remanding the cause to said Circuit Court, with directions to confirm the order of the Illinois Commerce Commission.

14. The Supreme Court of the State of Illinois erred in not affirming the order of the Circuit Court of St. Clair County, Illinois.

PRAYER FOR REVERSAL

For which errors appellant prays that the said final judgment of the Supreme Court of the State of Illinois in said cause, dated March 16, 1942, and which became final by the denial by said Supreme Court of the State of Illinois of appellant's petition for rehearing on May 12, 1942, may be reversed and judgment rendered in favor of appellant and for costs, and that such orders may be entered herein by the Supreme Court of the United States as to it shall seem meet and proper and as to law and justice may appertain.

Bruce A. Campbell, Rudolph J. Kramer, Carleton S. Hadley, Walter N. Davis, Louis A. McKeown, Counsel for Appellant, Terminal Railroad Association of St. Louis.

[fol. 383] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—June 11, 1942

The petition of Terminal Railroad Association of St. Louis, appellant in the above entitled cause, for allowance of an appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Illinois having been filed with the Clerk of the Supreme

Court of the State of Illinois, and presented to me as Chief Justice of the Supreme Court of the State of Illinois, accompanied by assignments of error and a statement as to jurisdiction of the Supreme Court of the United States, on appeal, all as provided by the Rules of the Supreme Court of the United States, and the record in this cause having been by me considered,

It Is Hereby Ordered that an appeal be and it hereby is allowed in the above mentioned cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Illinois, dated March 16, 1942, and made final by the order of the said Supreme Court of the State of Illinois on May 12, 1942, denying appellant's petition for a rehearing (the Supreme Court of the State of Illinois being the highest court in said State in which a decision in said case could be had); and that the Clerk of the Supreme Court of the State of Illinois shall within forty days from the date of this order make and transmit to the Supreme Court of the United States, under his hand and the seal of said Supreme Court of the State of Illinois, a true copy of the material parts of the record herein, which [fols.384-385] shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Supreme Court of the United States.

It Is Further Ordered that the said appellant shall give a good and sufficient supersedeas bond, in the sum of Ten Thousand Dollars ($10,000.00), with surety to be approved by me, to be conditioned that appellant shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good; and that when said bond, conditioned as aforesaid and approved as aforesaid, is filed in the office of the Clerk of the Supreme Court of the State of Illinois, it shall operate as a supersedeas bond and thereupon all further proceedings in the Supreme Court of the State of Illinois shall be stayed and no mandate shall issue from the office of the Clerk of said Supreme Court of the State of Illinois until the final disposition of this cause by the Supreme Court of the United States.

And said appellant Terminal Railroad Association of St. Louis now presents to me its bond in the sum of Ten Thousand Dollars conditioned as aforesaid, and executed by it as principal and by Hartford Accident & Indemnity Company as surety. And having examined said bond and be-

ing satisfied therewith and with the amount, conditions thereof and the surety therein, It is Ordered, that said bond be and the same is hereby approved.

Dated this 11 day of June, 1942.

Loren E. Murphy, Chief Justice of the Supreme Court of the State of Illinois.

[fols. 386-389] Bond on Appeal for $10,000.00 approved and filed June 11, 1942, omitted in printing.

[fols. 390-393] Citation in usual form showing service on George F. Barrett, filed June 12, 1942, omitted in printing.

[fol. 394] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE INDICATING PORTIONS OF RECORD TO BE INCLUDED IN THE TRANSCRIPT ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 12, 1942

Terminal Railroad Association of St. Louis, appellant in the above cause, hereby designates the portions of the record in said cause to be included in the transcript to be transmitted by you to the Supreme Court of the United States on the appeal of said cause to said Court:

1. The abstract of record of the Circuit Court of St. Clair County, Illinois, filed in the Supreme Court of the State of Illinois by the above named appellees.

2. The additional abstract of record of the Circuit Court of St. Clair County, Illinois, filed in the Supreme Court of the State of Illinois by the above named appellant.

3. All orders and judgments of the Supreme Court of the State of Illinois in the above cause, excluding the order denying appellant's motion for rehearing but including orders of submission, judgment, etc.

4. The opinion of the Supreme Court of the State of Illinois, filed in said cause, reversing the judgment of the Circuit Court of St. Clair County, Illinois.

5. The petition for rehearing filed by appellant, Terminal Railroad Association of St. Louis, in said cause.

6. The order of the Supreme Court of the State of Illinois denying said petition for rehearing.

7. The petition for appeal to the Supreme Court of the United States.

[fol. 395] 8. The assignment of errors accompanying said petition for appeal.

9. Statement filed by appellant in support of jurisdiction of the Supreme Court of the United States on appeal of above cause.

10. The order allowing said appeal, providing for supersedeas bond and for stay of proceedings on approval of same.

11. The bond, together with the approval of same by the Chief Justice of the Supreme Court of the State of Illinois.

12. The citation, with acknowledgment of service by appellees.

13. Notice sent to appellees together with copies of petition for and order allowing appeal, assignment of errors, statement in support of jurisdiction of the Supreme Court of the United States on appeal and statement directing attention of appellees to paragraph 3 of Rule 12 of the Rules of The Supreme Court of the United States, and proof of service of the same.

14. The certificate of the Clerk, authenticating the transcript of record as to all of the above papers and documents.

The Clerk will please show the date of the filing or entering of each document or paper above mentioned.

Dated this 11th day of June, 1942.

Bruce A. Campbell, Rudolph J. Kramer, Carleton S. Hadley, Walter N. Davis and Louis A. McKeown, Counsel for Appellant, Terminal Railroad Association of St. Louis.

To: Honorable Edward F. Cullinane, Clerk of the Supreme Court of the State of Illinois.

Service of a copy of the above praecipe is acknowledged this 12th day of June, 1942.

[fols. 396-397] George F. Barrett, Counsel for Appellee, Illinois Commerce Commission, Attorney General of State of Illinois. A. A. Schwarzbach and Alvin E. Stein, Counsel for Appellee, Brotherhood of Railroad Trainmen, Richard Abram, Chairman and State Legislative Representative.

[fol. 398] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 399] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON THE ABOVE APPEAL, AND DESIGNATION OF THE PARTS OF THE RECORD WHICH IT THINKS NECESSARY FOR THE CONSIDERATION THEREOF—Filed July 10, 1942

Now comes Terminal Railroad Association of St. Louis, Appellant in the above cause, by Bruce A. Campbell, Rudolph J. Kramer, Carleton S. Hadley, Walter N. Davis and Louis A. McKeown, its counsel, and, in accordance with the provisions of Rule 13 of the Rules of the Supreme Court of the United States, states the points upon which it intends to rely upon the appeal of said cause, as follows, to-wit: Appellant on said appeal intends to rely upon the following points in support of its prayer for reversal of the judgment and order of the Supreme Court of the State of Illinois, viz:

[fol. 400] 1. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order in question of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States so far as the runs described in Finding 35 were concerned, viz: the bridge runs; and in holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was not a direct burden on interstate commerce and did not directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic; and in holding, deciding and determining that the necessary effect of said order as to said runs was not directly to burden interstate commerce by requiring a like compliance in the State of Missouri, where the Illinois Commerce Commission has no power, jurisdiction or authority; and in holding, deciding and adjudging that such a burden on interstate commerce was not repugnant to the interstate commerce clause of the Constitution of the United States, viz: Section 8 of Article I thereof.

2. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Com-

mission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 35 were concerned, viz: the bridge runs; and in not holding, deciding and adjudging that even if Congress had not legislated upon the subject the effect of the order as to such runs was and is a direct burden on interstate commerce and directly burdens or impedes interstate traffic or impairs the usefulness of facilities for such traffic; and in not holding, deciding and determining that said order, as a practical proposition, created a direct burden on interstate commerce [fol. 401] by requiring a like compliance in the State of Missouri, where the Illinois Commerce Commission had no power, jurisdiction or authority; and in not holding, deciding and adjudging that such a burden on interstate commerce was repugnant to the interstate commerce clause of the Constitution of the United States, viz: Section 8 of Article I thereof.

3. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States so far as the runs described in Finding 34 were concerned, viz: the inter-yard runs in Illinois, which contained 98% of interstate freight; and in not holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was not a direct burden on interstate commerce and did not directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic; and in holding, deciding and adjudging that such a burden on interstate commerce was not repugnant to the interstate commerce clause of the Constitution of the United States, viz: Section 8 of Article I thereof.

4. The Supreme Court of the State of Illinois erred in not holding, deciding and adjudging that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 34 were concerned, viz: the inter-yard runs in Illinois, which contained 98% of interstate freight; and in not holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was and is a direct burden [fol. 402] on interstate commerce and directly burdens or

impedes interstate traffic or impairs the usefulness of facilities for such traffic; and in not holding, deciding and adjudging that such a burden on interstate commerce was repugnant to the Constitution of the United States, viz: Section 8 of Article I thereof.

5. The Supreme Court of the State of Illinois erred in holding that Congress had not taken charge of the field relative to the furnishing, maintenance and operation of caboose cars as to runs mentioned in both Findings 34 and 35; and in holding, deciding and adjudging that the State could legislate in the field even though the effect upon interstate commerce was indirect, and even though Congress had not legislated as to the particular matters involved, and under such circumstances, in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and was not repugnant to the interstate commerce provisions of said Constitution, contained in Section 8 of Article I thereof.

6. The Supreme Court of the State of Illinois erred in not holding, deciding and adjudging that Congress had taken charge of the field relative to the furnishing, maintenance and operation of caboose cars as to all of the runs mentioned in both Findings 34 and 35, and that therefore, inasmuch as Congress had taken charge of the field by appropriate legislation, the State of Illinois could not legislate in that field, even though the effect upon interstate commerce was indirect, and even though Congress had not legislated as to the particular matters involved; and in not holding, deciding and adjudging that for these reasons the order of the Illinois Commerce Commission was invalid [fol. 403] and repugnant to the Constitution of the United States, and particularly repugnant to the interstate commerce provisions of said Constitution contained in Section 8 of Article I thereof.

7. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order of the Illinois Commerce Commission as to all of the transfer runs was not unreasonable because of the exorbitant expense required in order to comply with it, and in holding that such expense of compliance with the order was not so exorbitant when compared with the benefits accruing therefrom, nor were the said benefits so disproportionate to the cost

thereof that the enforcement of the order would not deprive Appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States, and in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto.

8. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission as to all of the transfer runs was unreasonable and arbitrary because of the exorbitant expense required in order to comply with it; in not holding that such expense of compliance with the order was not exorbitant when compared with the benefits accruing therefrom and the said benefits so disproportionate to the cost thereof that consequently the enforcement of the order would deprive Appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States; and in not holding, deciding and adjudging, for the reasons set forth in this assignment of errors, that the [fol. 404] order of the Illinois Commerce Commission was invalid for the reason that it was repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, by depriving Appellant of its property without due process of law.

9. The Supreme Court of the State of Illinois erred in holding that the said order of the Illinois Commerce Commission was not repugnant to the interstate commerce clause of the Constitution of the United States contained in Section 8 of Article I thereof.

10. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission was invalid and repugnant to the interstate commerce clause of the Constitution of the United States contained in Section 8 of Article I thereof.

11. The Supreme Court of the State of Illinois erred in holding that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, prohibiting a State from depriving a person of his property without due process of law.

12. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, for the reason that said order deprives Appellant of its property without due process of law.

13. The Supreme Court of the State of Illinois erred in reversing the judgment of the Circuit Court of St. Clair County, Illinois, and in remanding the cause to said Circuit [fol. 405] Court, with directions to confirm the order of the Illinois Commerce Commission.

14. The Supreme Court of the State of Illinois erred in not affirming the order of the Circuit Court of St. Clair County, Illinois.

Furthermore, in accordance with the provisions of said Rule 13 of the Rules of the Supreme Court of the United States, said Appellant, Terminal Railroad Association of St. Louis, hereby designates the parts of the record which it thinks necessary for the consideration of said points upon which it intends to rely, as follows:

Appellant being of the opinion that the printing of the entire record, as certified by the Clerk of the Supreme Court of the State of Illinois, is necessary for the consideration of said points upon which it intends to rely, and the Honorable George F. Barrett, Attorney General of the State of Illinois and counsel on this appeal for the Appellee, Illinois Commerce Commission, having further signified his desire to that effect, designates that the entire record as so certified by the Clerk of the Supreme Court of the State of Illinois shall be printed by and under the supervision of the Clerk of the Supreme Court of the United States, omitting, however, from said printed record all duplication, all repetition of titles, and all other obviously unimportant matters, as required of the Clerk by said Rule 13 of the Supreme Court of the United States.

Inasmuch as the Statement of Jurisdiction of the Supreme Court of the United States on this appeal, and Appellees' Answer thereto, will be printed by the Clerk as required by Rule 12 of the Rules of the Supreme Court of the United States, Appellant does not think it necessary [fol. 406] that such Statement and Appellees' Answer

thereto be reprinted in the record, unless by custom and practice the same are again printed in the record. If custom and practice so justify the omission of said Statement as to Jurisdiction and Appellees' Answer thereto from the printed record, Appellant respectfully requests that the same be omitted, but if custom and practice require the reprinting of same in the record after the same have been printed as separate documents for the use of the Court, then Appellant designates that they be so reprinted in the record.

This statement and designation is filed to comply with the provisions of paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States.

Dated this 8th day of July, A. D. 1942.

Bruce A. Campbell, Rudolph J. Kramer, Carleton S. Hadley, Walter N. Davis, Louis A. McKeown, Counsel for Appellant, Terminal Railroad Association of St. Louis.

[fol. 407] In the Supreme Court of the United States

Terminal Railroad Association of St. Louis, Appellant,

vs.

Brotherhood of Railroad Trainmen, Richard Abram, Chairman and State Legislative Representative, and Illinois Commerce Commission, Appellee.

Appeal from the Supreme Court of the State of Illinois to the Supreme Court of the United States

State of Illinois,
County of St. Clair, ss:

Bruce A. Campbell, being first duly sworn, upon his oath deposes and says that he is a resident of the County of St. Clair and State of Illinois; that he is now and for more than forty years last past has been duly licensed to practice law in the State of Illinois; that he is now and for more than twenty-seven years last past has been a member of the bar of the Supreme Court of the United States, and that he is now and has been one of the attorneys of record for Ter-

minal Railroad Association of St. Louis, Appellant in the above entitled cause.

Affiant further says that on the 8th day of July, 1942, he did send by United States mail, first class postage prepaid, a copy of Appellant's "Statement of Points upon which Appellant intends to rely on the above appeal, and Designation of the parts of the record which it thinks necessary for the consideration thereof", to each of the following persons, who are the attorneys and counsel for the above named Appellees in said cause, viz:

Hon. George F. Barrett, Attorney General of the State of Illinois, 208 South LaSalle Street, Chicago, Illinois. Attention: Mr. Albert E. Hallett.

Mr. A. A. Schwarzbach, Attorney at Law, 10 South LaSalle Street, Chicago, Illinois.

Mr. Alvin E. Stein, Attorney at Law, 10 South LaSalle Street, Chicago, Illinois.

[fol. 408] That said above named persons are all of the counsel of record for said Appellees in the above entitled cause, and that their respective post office addresses are as above set forth.

That the envelopes containing the said statement and designation were addressed to said counsel at the addresses and in the manner and form as above set forth.

That Hon. George F. Barrett, Attorney General of the State of Illinois, had requested this affiant in writing to serve all notices and other documents in said cause upon him at his Chicago address, as above set forth, and to note on the envelope that the matters mailed, as aforesaid, were for the attention of Albert E. Hallett, who is one of his assistants.

And further this affiant saith not.

Bruce A. Campbell.

Subscribed and sworn to before me this 8th day of July, A. D. 1942. Clara Helms, Notary Public. (Seal.)

[fol. 409] [File endorsement omitted.]

[fol. 410] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 12, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 46,712. Illinois, Supreme Court. Term No. 218. Terminal Railroad Association of St. Louis, Appellant, vs. Brotherhood of Railroad Trainmen, Richard Abram, Chairman and State Legislative Representative, and Illinois Commerce Commission. Filed July 10, 1942. Term No. 218, O. T. 1942.

FILE COPY

JUL 10 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 218

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, CHAIRMAN AND STATE LEGISLATIVE REPRESENTATIVE, AND ILLINOIS COMMERCE COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

BRUCE A. CAMPBELL,
RUDOLPH J. KRAMER,
CARLETON S. HADLEY,
WALTER N. DAVIS,
LOUIS A. MCKEOWN,
Counsel for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 218

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, CHAIRMAN AND STATE LEGISLATIVE REPRESENTATIVE, AND ILLINOIS COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS TO THE SUPREME COURT OF THE UNITED STATES.

STATEMENT AS TO JURISDICTION ON APPEAL.

Preliminary Statement.

To acquaint the Court with the nature and character of this proceeding, and in order that our statement in support of the jurisdiction of the Supreme Court of the United States on direct appeal may be better understood, we preface this statement with a short history of the case.

On March 4, 1938, appellee, Brotherhood of Railroad Trainmen, by its Chairman and State Legislative Representative, filed with appellee, Illinois Commerce Commission, its petition, alleging that appellant here was a public utility, subject to the provisions of the Act of the State of Illinois providing for the regulation of public utilities; that appellant had failed to provide caboose cars for switchmen in the territory in, around and about East St. Louis, Illinois, and as a result thereof switchmen in the performance of their duties on transfer runs were necessarily required either to ride on the drawbar, in between freight cars, or on the top of, or on the side of freight cars, where numerous reduced vertical and horizontal clearances prevail, thus endangering the life, health and safety of the aforesaid switchmen of transfer cars and of other employes of appellant and of the public within the State of Illinois (Tr. 2—22, 23). The petition prayed that appellant be required to answer the charges, and that the Illinois Commerce Commission would make such order in the premises as might seem meet.

Appellant answered this petition, denying the allegations thereof, expressly denying that the Commission had any power, right or authority to enter any order in regard to the subject matter of the complaint so far as any movements in interstate commerce were concerned, and expressly averring that so far as interstate movements of trains or cuts of cars were concerned, the Commission had no power, jurisdiction or authority to enter any order requiring cabooses upon interstate runs between the State of Illinois and the State of Missouri; and expressly raised the question of the jurisdiction of the Commission so far as any interstate runs or movements were concerned (Tr. 2—23, 24).

On February 1, 1940, the Illinois Commerce Commission entered its findings and order in this cause. By said order

(Tr. 2—1 to 17), after extensive findings as to the need of caboose cars, the Commission found by its Finding 34 (Tr. 2—15), that it was reasonable to require appellant to furnish, maintain and operate caboose cars throughout the year on its transfer delivery and industrial runs, twenty in number, between certain of its yards located in the State of Illinois; and likewise, by its Finding 35 (Tr. 2—16) found that it was reasonable to require appellant to furnish, maintain and operate caboose cars throughout the year on its transfer delivery runs in the State of Illinois on all runs over the Eads and Merchants Bridges between the States of Illinois and Missouri. After making such findings, the Commission ordered (Tr. 2—17) that appellant be required and directed to furnish, maintain and operate caboose cars on its transfer, delivery and industrial runs, more specifically set forth in Finding 34 of the order, within sixty days from the date of the service of the order, and likewise that appellant be required and directed to furnish, maintain and operate caboose cars on its transfer and delivery runs, more specifically set forth in Finding 35 of the order, within thirty days after the date of the service of the order.

The Commission also by its order (Tr. 2—17) expressly denied the motion of appellant to dismiss the proceedings for want of jurisdiction.

Of the five members of the Commission, three voted in favor of the findings and order of the Commission and one Commissioner dissented as to the bridge runs covered by Finding 35 on the ground that the part of the order of the Commission based on Finding 35 was an attempt improperly and unlawfully to regulate interstate commerce and therefore beyond the jurisdiction of the Commission.

Appellant, complying with the statutory requirements, filed an application for rehearing before the Commission which application was denied. Appellant then appealed to

the Circuit Court of St. Clair County, Illinois, where the cause, as provided by the Illinois statutes, was heard on the record made before the Commission. On July 26, 1940, the Circuit Court of St. Clair County, Illinois, without opinion and passing only upon that portion of the order requiring caboose cars on runs across the bridges, found that that part of the order of the Commission requiring cabooses to be attached to runs moving between the States of Illinois and Missouri over the Eads and Merchants Bridges was an interference with interstate commerce and was beyond the jurisdiction of the Illinois Commerce Commission. The Circuit Court further found that under the decision rendered by the Supreme Court of Illinois in the case of *Brotherhood of Railroad Trainmen* v. *E. J. & E. Ry. Co.*, 374 Ill. 60, the power of the Circuit Court was limited to either affirming in its entirety or setting aside in its entirety the order of the Commission. The Circuit Court, under the last mentioned decision, therefore, having found that the order was bad in one respect, did not pass upon any other questions in the case for the reason that under said decision, if the order of the Commission was erroneous in one respect it must necessarily be set aside. The order and judgment of the Circuit Court appear in the Transcript p. 2—269-270. In its opinion in the instant case (Tr. 9) the Supreme Court of the State of Illinois reiterated and reaffirmed the procedural law as found by the Circuit Court. After making such findings, the Circuit Court ordered and adjudged that the said order and decision of the Illinois Commerce Commission in said cause be and the same was reversed and set aside. Appellees in this proceeding then duly perfected an appeal from the order and judgment of the Circuit Court to the Supreme Court of the State of Illinois.

While upon an argument of the merits of this appeal a further and more extended statement may be necessary,

yet on the question of the jurisdiction of the Supreme Court of the United States on appeal in this cause only a few of the facts are material.

Appellant is a railroad corporation, engaged wholly as a terminal and switching carrier engaged in yard operations, and its freight trains do not run on any regular schedule such as those of trunk lines do (Tr. 4-9). In Illinois it has three large yards, each of which consists of a number of tracks ranging in capacity from ten to seventy cars each, and with a very large number of tracks in each yard (Tr. 4-9, 10). In each of these yards during each eight-hour period during the entire twenty-four hour day, there are many switch crews engaged in breaking up and making up trains and in transporting such trains when made up either to one of the other yards in Illinois or to the yards of trunk lines in Illinois or to one of the four or five yards of appellant in Missouri (Tr. 4-10). In addition, appellant makes transfer deliveries to certain other railroad yards of trunk lines in Illinois (Tr. 4-9, 10).

Two railroad bridges operated by appellant span the Mississippi River, joining the East St. Louis district with St. Louis, Missouri, the bridges being known as the Eads Bridge and the Merchants Bridge. As to all of the bridge runs, nothing is transported except in interstate commerce. On the transfer runs between the yards of appellant in Illinois and between these yards and other trunk line yards in Illinois, 98% of the merchandise transported is carried in interstate commerce (Tr. 2-111). About 68 passenger trains cross the Eads Bridge every day and in the early part of the week about the same number of freight trains cross that bridge each day, while in the latter part of the week the number of freight trains exceeds the number of passenger trains (Tr. 2-106). Approximately the same number of trains cross the Mer-

chants Bridge every day (Tr. 2-107). It is impossible to cut off a caboose in the middle of the river and leave it standing on either of these bridges; there is no place to do this and it would tie up the main tracks (Tr. 2-106). It is impossible to couple to a caboose in crossing the river (Tr. 2-108). At the west end of the Eads Bridge the tracks enter a tunnel, which runs for about one mile under the City of St. Louis (Tr. 2-108). If cabooses were required on these bridge runs, it would be necessary on both bridges on runs to Missouri to attach the caboose in the yards in Illinois where the cut is made up and carry the caboose across the bridge (and when moving over the Eads Bridge, through the tunnel) into Missouri to the yards that the cut is destined to; and on runs from Missouri to Illinois it would be necessary likewise as to both bridges to attach the caboose in the yards in Missouri (and when moving over the Eads Bridge, run through the tunnel in Missouri), across the bridge and carry it to the yards in Illinois (Tr. 2-107). In other words, the order itself, although on its face limiting the provisions from and to the State line—the middle of the river—as a practical proposition requires cabooses, both coming into and going from Illinois, to be carried in Missouri between the middle of the river and a yard in Missouri (Tr. 2-107).

The only practical way to comply with the Commission's order would be to start in Missouri on movements to Illinois at the yards in Missouri and bring the caboose the whole way to the yards in Illinois; and on a movement from Illinois to Missouri to attach the caboose in the yards in Illinois and take it to the yards in Missouri. This situation applies to both bridges (Tr. 2-107).

The furnishing of cabooses has always been considered a working condition and has been dealt with as such by appellant and its switchmen, and cabooses have always

in switching, and that after the first year the cost would be $250,000 per year (Tr. 2-114). This estimate was based (Tr. 2-114) upon 40 minutes' delay on each run, on the number of runs involved and the application of a flat figure of $10.00 per run in added expense (Tr. 2-114).

Appellee's testimony showed that the delay would average 11 minutes per run; that the initial cost of new cabooses would be $44,000 per year and the extra annual expense in wages about $62,000, but this estimate did not include anything except wages (Tr. 2-123).

The Supreme Court of Illinois found that the delay on each run would be from eleven to forty minutes (Tr. 13).

The undisputed evidence showed that if cabooses were attached to these runs the cabooses would be used only by one employee out of five on each run and by that employe for only from one-sixth to one-eighth of the time that he worked, and that during the balance of his working period he would be exposed to the same hazards, and in fact additional hazards. The Supreme Court of the State of Illinois in its opinion (Tr. 7 to 26) substantially found the facts as stated herein.

On March 16, 1942, the Supreme Court of the State of Illinois passed not only upon the one question decided by the Circuit Court of St. Clair County, but as it had a right to do under the decision of *People* v. *Bradford*, 372 Ill. 63, l. c. 65, 66, passed on the other questions involved in the case, and handed down an opinion reversing the judgment of the Circuit Court and remanding the cause to the Circuit Court, with directions to confirm the order of the Commission. A true copy of said opinion is attached hereto and made a part hereof. The opinion of the Supreme Court of the State of Illinois is officially reported in 379 Ill. 403.

Appellant, within the time provided by law, filed a petition for rehearing in the Supreme Court of Illinois, which said petition for rehearing was by the Supreme Court of

the State of Illinois denied on May 12, 1942 (Tr. page 24) whereupon the said judgment of the Supreme Court of the State of Illinois became a final judgment of that Court. The Supreme Court of Illinois is the highest court of the State of Illinois in which a decision in this suit could be had.

Hereafter, as provided by the Rules of the Supreme Court of the United States, under another heading, we shall set forth the substantial federal questions involved in this appeal, and shall demonstrate that they are substantial and were properly drawn in question in the Supreme Court of Illinois.

Statutory Provisions Sustaining Jurisdiction of Supreme Court of the United States.

The Supreme Court of the United States has jurisdiction of this cause under the Judicial Code, Sec. 237 as amended (28 U. S. C. A., 344), which provides:

> (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ. * * *
>
> (c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the

papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed:"

Secs. 861a and 861b of the United States Code (28 U. S. C. A. Supp.) provide for the substitution of appeal for writ of error, as provided in Sec. 237 of the Judicial Code. These sections are as follows:

"861a. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

"861b. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

Decisions of the Supreme Court of the United States holding that an order of a commission is in effect a statute of the State for jurisdictional purposes on appeal.

While the statute of the United States provides only for a direct appeal to the Supreme Court of the United States where there is drawn in question the validity of a statute of a State on the ground of its being repugnant to the Constitution, etc., of the United States, yet the Supreme Court of the United States had held that an order of a State commission, being legislative in its nature and made by an instrumentality of the State, is a State law within the meaning of the Constitution of the United States and the laws thereof regulating the jurisdiction of the Supreme Court.

This question arose in the case of *Lake Erie & Western R. R. Co.* v. *State Public Utilities Com. of Illinois, ex rel.*

Cameron, 249 U. S. 422, which was an appeal from the State Public Utilities Commission of Illinois, the predecessor body of the Illinois Commerce Commission. The appeal in that case was from a judgment of the Supreme Court of Illinois, affirming the order of the Circuit Court which had affirmed the order of the old Public Utilities Commission. The question was raised in the Supreme Court of the United States that such an order of the Illinois Commission did not constitute a statute of the State of Illinois within the meaning of Sec. 237 of the Judicial Code. In holding to the contrary, the Supreme Court of the United States said, l.c. 424:

> "Such an order, being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction. Grand Trunk Western Ry. Co. *v.* Railroad Commission of Indiana, 221 U. S. 400, 403; Ross *v.* Oregon, 227 U. S. 150, 162-163; Home Telephone & Telegraph Co. *v.* Los Angeles, 227 U. S. 278, 295-296; Atlantic Coast Line R. R. Co. *v.* Goldsboro, 232 U. S. 548, 555; Wadley Southern Ry. Co. *v.* Georgia, 235 U. S. 651, 660-661; Arkadelphia Milling Co. *v.* St. Louis Southwestern Ry. Co., 249 U. S. 134."

In *Live Oak Water Users' Assn.* v. *R. R. Com. of Cal.*, 269 U. S. 354, the Supreme Court of the United States held that a rate-fixing order made by a State commission acting under a State statute is for jurisdictional purposes, in applying Sec. 237 of the Judicial Code, an Act of the State legislature.

Statutes of Illinois, Validity of Which Is Involved.

Under the preceding heading we have shown that for jurisdictional purposes the order of the Illinois Commerce Commission is a statute of the State of Illinois, and that its validity is involved in this proceeding. However, such order

of the Commission purports to have been issued by virtue of a statute of Illinois entitled: "An Act concerning public utilities", approved June 29, 1921, in force July 1, 1921, the same being Chap. 111⅔ of the Illinois Revised Statutes 1941, and appearing in that statute on pages 2492 to 2524, inclusive. In general, the Act creates a Commission known as the Illinois Commerce Commission, consisting of five members, with rather full and plenary jurisdiction over all public utilities.

Appellees claim that the jurisdiction of the Illinois Commerce Commission of the matter involved arises under and by virtue of Sec. 32 (Ill. Rev. Stat. 1941, p. 2503); Sec. 50 (Ill. Rev. Stat. 1941, p. 2508), and Sec. 60 (Ill. Rev. Stat. 1941, p. 2512) of the Illinois Commerce Commission Act. These sections are as follows:

> "32. All rates or other charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or for any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful. Any public utility, with the consent and approval of the Commission, may as a basis for the determination of the charges made by it classify its service according to the amount used, the time when used, the purpose for which used, and other relevant factors.
>
> Every public utility shall furnish, provide and maintain such service instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees, and public and as shall be in all respects adequate, just and reasonable.
>
> All rules and regulations made by a public utility affecting or pertaining to its charge or service to the public shall be just and reasonable."

"50. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or any two or more public utilities ought reasonably to be made or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected in the manner and within the time specified in said order. If any additions, extensions, repairs, improvements or changes, or any new structure or structures which the Commission has ordered to be erected, require joint action by two or more public utilities, the Commission shall notify the said public utilities that such additions, extensions, repairs, improvements or changes or new structure or structures have been ordered and that the same shall be made at the joint cost whereupon the said public utilities shall have such reasonable time as the Commission may grant within which to agree upon the apportionment or division of cost of such additions, extensions, repairs, improvements or changes or new structure or structures, which each shall bear. If at the expiration of such time such public utilities shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs, improvements or changes, or new structure or structures, the Commission shall have authority, after further hearing, to make an order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured."

"60. The Commission, or any commissioner, assistant commissioner, or officer of the Commission designated by the Commission, shall have power to hold

investigations, inquiries and hearings concerning any matters covered by the provisions of this Act, or by any other Acts, relating to public utilities subject to such rules and regulations as the Commission may establish. In the conduct of any investigation, inquiry or hearing neither the Commission nor any commissioner, assistant commissioner or officer of the Commission shall be bound by the technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner, assistant commissioner or an officer of the Commission shall invalidate any order, decision rule or regulation made, approved, or confirmed by the Commission. All hearings conducted by the Commission shall be open to the public.

Each commissioner, each assistant commissioner, the secretary of the Commission, and every officer of the Commission designated by it to hold any inquiry, investigation or hearing, shall have the power to administer oaths and affirmations, certify to all official acts, issue subpoenas, compel the attendance and testimony of witnesses, and the production of papers, books, accounts and documents.

Hearings shall be held either by the Commission or by one or more commissioners, or assistant commissioners. All evidence presented at hearings held by the Commission or under its authority shall become a part of the records of the Commission. In all cases in which the Commission bases any action on reports of investigation or inquiries not conducted as hearings, such reports shall be made a part of the records of the Commission."

Appellant has from the ontset and consistently claimed that no such jurisdiction existed in the Commission because of the provision of Sec. 90 of the Illinois Commerce Commission Act (Ill. Rev. Stat. 1941, p. 2524), which provides as follows:

"90. Neither this Act nor any provision thereof shall apply or be construed to apply to commerce with

foreign nations or commerce among the several states of this union, except when specifically so stated, and insofar as the same may be permitted under the provisions of the Constitution of the United States and Acts of Congress, and the decisions of the Supreme Court of the United States."

In addition, Sec. 66 of the Act (Ill. Rev. Stat. 1941, p. 2513) provides for process to secure the attendance of witnesses; Sec. 64 of the Act (Ill. Rev. Stat. 1941, p. 2513) provides for complaints by the Commission on its own motion or by any other person or organization, and for notice of hearing on such complaints; Sec. 65 (Ill. Rev. Stat. 1941, p. 2514) provides for hearing and issuance of orders; Sec. 66 (Ill. Rev. Stat. 1941, p. 2514) provides for service of orders on the parties concerned; Sec. 71 (Ill. Rev. Stat. 1941, p. 2515) provides for filing of petitions for rehearing and contains a requirement that the Commission pass on the same, and Sec. 68 (Ill. Rev. Stat. 1941, p. 2515) provides for appeals to the Circuit Courts and for appeals from Circuit Courts to the Supreme Court of the State.

A true copy of the order of the Commission and the dissenting opinion of Commissioner Olson are attached hereto and made a part hereof.

Date of Judgment and Application for Appeal.

The date of the judgment sought to be reversed is March 16, 1942, and such judgment became final on May 12, 1942, when the Supreme Court of Illinois denied appellant's petition for rehearing.

Application for appeal to the Supreme Court of the United States from said judgment of the Supreme Court of Illinois was presented June 11, 1942.

Stage At Which the Federal Questions Were Raised.

In its written answer filed with the Illinois Commerce Commission, appellant raised for the first time and at the first opportunity the question of the jurisdiction of the Commission over all or any of the runs described in the petition and herein. After denying the allegations of the petition, in paragraph 3 of its answer (Tr. 2-24), it said:

> "it expressly denies that this Honorable Commission has any power, right or jurisdiction to enter any order in regard to the subject matter of this complaint so far as any movements in interstate commerce are concerned."

And in paragraph 6 of its answer (Tr. 2-24), it averred as follows:

> "6. For further answer to the complaint this respondent expressly says that so far as interstate movements of trains or cuts of cars are concerned, this Commission has no power, jurisdiction or authority to enter any order requiring cabooses upon interstate runs between the State of Illinois and the State of Missouri, and this respondent expressly raises said question of jurisdiction of the Commission so far as any interstate runs or movements are concerned."

At the first hearing of the case (Tr. 4—2), appellant specifically raised the question of the jurisdiction of the Commission over the runs involved in interstate commerce, and during the course of the objection, the point was specifically raised by motion and objection that the Commission had no jurisdiction over either the bridge runs or the inter-yard runs in Illinois. The following occurred, as disclosed by Tr. 4—3-5:

> "Mr. Campbell: Well, that would be regulating interstate commerce, too, and this Commission would have no jurisdiction to enter any order covering the move-

ment from one state to another, which it would be, across the Eads Bridge and the Merchants Bridge.

Mr. Schwarzbach: I am not asking for any movement into Missouri at all; the movement was only to the Illinois side of this particular bridge.

Mr. Campbell: I think, if the Examiner please, we have reached a point in this case, not only as to this point, but I also expect to raise the same point as to any cuts containing interstate commerce, that is commerce among the various states. I think we have reached a legal question which should be decided before we proceed any further.

Examiner Daley: Let's get off the record for a time and see what we can do.

(Whereupon a discussion was had out of the record.)

Examiner Nyka: In view of the fact that we cannot reach any agreement, we might as well go ahead and then we will rule at the proper time.

Mr. Schwarzbach: For the purpose of the record, Mr. Examiner please, I would like to call your attention to paragraph 51 on pages 42, 43 and 44 which specifically gives this Commission jurisdiction to handle, fix and establish switching rules and regulations and so forth, and our case comes specifically within that paragraph. Will you go ahead now, Mr. Jenkins?

Mr. Campbell: Well, now, for the record, I want to make this specific objection as to the two bridges, and I also want to raise the question that this Commission has no jurisdiction over any of the movements that contain cars being transported in interstate commerce, even though the movements be within the State of Illinois. I want to get that clear in the record, because I do not want to delay matters by objecting all the time. I want my views in both instances in the record.

Examiner Daley: They will probably come up from time to time, and they will be sufficiently clarified as we go along.

Mr. Abram: You want it understood that there is a general objection all the way through.

Mr. Campbell: Yes.

Mr. Abram: All right.

Mr. Campbell: I want it clearly understood that I am making the two distinctions, one as to the actual movement over the bridges and the other as to movement from one point in Illinois to another point in Illinois, but containing cars being transported in interstate commerce.

Mr. Schwarzbach: We have no objection to that general objection.

Examiner Nyka: All right."

Furthermore (Tr. 4—5-6), the following occurred:

"Q. In your opinion, would it be possible to put crossovers on these bridges in the State of Illinois?

Mr. Campbell: I object to that; there couldn't be any duty, in addition to the other objections, to taking a caboose to the middle of the river and then put it over on another main track and leave it there to obstruct traffic while they went over to St. Louis and back or vice versa.

Examiner Nyka: What was the question?

(Question read.)

Mr. Schwarzbach: I might say, in answer to Mr. Campbell, if the Commission finds that this endangers the lives of these switchmen or some of the employes, they certainly would have a right to order the railroad to put these crossovers there if they find it necessary. I think it is entirely within the province of the Commission.

Mr. Abraham: In that event a caboose could be switched within the boundaries of Illinois and it would not necessarily have to go across the river. It would provide railroad facilities for cutting off the caboose and confining it strictly to the Illinois boundary line.

Examiner Nyka: He may answer. Objection overruled."

Furthermore, in the order of the Commission (Tr. 2—3), the Commission recites the facts as follows:

> "On June 29, 1939, respondent filed its brief on the question of jurisdiction. On July 15, 1939, complainant filed its brief in answer to the brief filed by respondent. On August 4, 1939, respondent filed a brief in reply to said brief filed by complainant."

Again the record shows the following (Tr. 4—15-17):

> "After objection was made by Mr. Schwarzbach, as shown on Abs. p. 105, respondent, through its counsel, asked to have the ruling of the Commission on this proposition, stating it was essential, and the Assistant Commissioner stated that ruling would be reserved for the Commission. Whereupon Mr. Campbell, for respondent, made the offer shown at the top of page 105 of the abstract. Whereupon the witness Davis stated, in reply to question propounded by the Assistant Commissioner, that sixty-four passenger trains used the bridge each day. Objection was made by petitioner to the offer on the ground that it goes beyond the Illinois line. Whereupon Mr. Campbell, for the respondent, stated that the purpose was to show conditions there and to follow it up with testimony to show that it would be wholly impracticable, if an order were entered, for a caboose from the middle of the river to any place in Illinois or from any place in Illinois to the middle of the river, to comply with that order without affecting interstate commerce. Whereupon Mr. Schwarzbach, for the petitioner, asked counsel for respondent whether he meant to say that respondent could not have a caboose go all the way across the river, to which Mr. Campbell replied that the effect of the order would be to take the caboose to the middle of the river. The Assistant Commissioner then stated that they would allow the Commission to decide the question as to whether it should go past the center of the bridge. Whereupon Mr. Campbell, for the respondent, made the offer shown (Rec. p. 391), starting about the middle of

page 105 of the abstract. Whereupon the Assistant Commissioner stated that they had no jurisdiction across the river. Whereupon Mr. Campbell stated that he wanted the evidence in the record. Whereupon the Assistant Commissioner stated that this was a question for the Commission to decide after all the evidence was in. Whereupon Mr. Campbell stated that he was asking for a ruling on it now, and asked what the Examiner's ruling was as to whether he could examine this witness on these questions. Whereupon the Assistant Commissioner sustained the objection."

After these motions and objections were made, the Commission called an informal conference of the parties with the Commission to discuss the questions of jurisdiction that had been raised. In the record appears the following (Tr. 4—19 to 22):

"June 28, 1939, an informal conference was held before the Commission on issue raised by request of complainant that inspectors of the Commission make an investigation of trans-Mississippi bridge runs of the respondent. Petitioner given leave to file brief within fifteen days and respondent given leave to reply thereto within ten days thereafter, and the issue of the inspectors making inspection of such trans-Mississippi runs taken under advisement by the Commission.

At the informal hearing before the Commission, the Acting Chairman stated that the question came up for consideration by the Commission as to whether or not the Commission had authority to have Mr. Thomas make an inspection of the trans-Mississippi runs, and to go out of the state in order to do so, Mr. Thomas stating that he would have to go outside the State of Illinois to make this investigation. That, in addition to runs in Illinois, there are runs originating in St. Louis that come over the two bridges and are delivered to these yards in East St. Louis and return to St. Louis with the cars or transfer runs, and they operate in the State of Illinois from the yards to the state line. Mr. Thomas stated that he had in mind to start his investi-

gation from the middle of the river, the state line, but he did not know how he could get off the train in the middle of the river; that to get off the trains in the middle of the river on the bridges, he would be in a position of making a request; that those are rather heavy grades and there is an operating situation there that is rather aggravated, and if such a request was made, he would not consider it in line to make a request to stop the trains—they are very heavy trains. He would have to go to St. Louis and get off of the train right at the Eads Bridge and start the investigation in Illinois, but he would have to be on the train before he arrived in Illinois. He would have to be on it after it was outside of the state. His investigation would stop at the state line, but the movements would all be movements from Illinois to Missouri, or Missouri to Illinois, interstate across one of the two bridges. That his understanding was that the runs actually originate in Missouri and come to Illinois and return from Illinois to Missouri. That they will bring a hundred cars to the yard, for instance, the same crew will take up the hundred cars and return to Missouri and in these movements they cross the Mississippi River across the bridges. The cut starts in Missouri with all the cars for Illinois, and it brings them to Illinois, and it picks up the cut from Illinois and takes them to Missouri.

Mr. Campbell then stated that, in addition to objections theretofore made to calling the witness, further objection was made that these runs are wholly interstate and that the Commission would have no jurisdiction in relation to whether cabooses were there or not, and stated that he had prepared a brief on the subject which he would be glad to file and would like to discuss it for a moment.

After Mr. Schwarzbach had stated that he had gotten a notice to appear on this date, but did not know what it was about the Acting Chairman, Mr. Hart, stated that on June 16th petitioner was notified that on June 20th, 1939, the Commission at its Springfield office would consider the issue raised. Then followed some discussion of the legal point involved. The complainant

was given permission to file a reply brief to the brief filed on the jurisdictional question by respondent.

During the discussion, Mr. Campbell, for the respondent, stated that this jurisdictional question had been raised at the first hearing of this case. Whereupon the Acting Chairman of the Commission stated that it was also raised before the Commission assigned an engineer to make the investigation.

Mr. Campbell then discussed the question of the right of the Commission to call a court witness, which was also answered by Mr. Schwarzbach.

The Commission asked for extra copies of respondent's brief and gave petitioner fifteen days within which to answer the brief.

The brief of respondent on the jurisdictional question was accompanied by brief on many other questions raised in the case. The brief covered substantially the same question as will be discussed in respondent's brief in this case.

A complete brief, consisting of thirty-nine pages, was filed by petitioner in reply to the brief of respondent and appears in full in the record.

There appears in the record in full the reply of the respondent to the brief filed by the complainant."

Furthermore, (Tr. 2—105, 106) appellant made certain offers of proof relative to the question of interstate commerce, which offers and the colloquy between counsel for appellees and appellant and the Assistant Commissioner are as follows:

"Mr. Campbell: I want to make a further offer,—that if an order were entered by this Commission, requiring a caboose from a point in Illinois to the middle of the river or from the middle of the river to a point in Illinois, it would be impossible and impracticable, with all the trains on those main tracks on the bridge, to cut off the caboose at the middle of the river; that the only practical way that order could be complied with would be to have another engine follow the train to the middle of the river, uncouple the

caboose and take it out of the way of the other train; and that if a caboose were required from the middle of the river to a point in Illinois or from a point in Illinois to the middle of the river, as a practical railroad proposition, it would require that we carry the caboose on; either put it on in Missouri on a movement to a point in Illinois, or take it to Missouri on a movement from Illinois to Missouri.

I am contending in this case, that this Commission cannot enter an order that would require a caboose on a train across the river. It has no jurisdiction in that.

Asst. Comr. Nyka: If such an order were entered, it would be up to the railroad to do what they want after they reach the center of the river.

Mr. Campbell: That is what I want to show. We can't do anything with it after carrying it to the point where the Commission has no jurisdiction to enter an order.

Asst. Comr. Nyka: The Commission has jurisdiction over the subject matter. What happens beyond the jurisdiction of the State, we are not concerned with. We don't know what ruling will be given, until all the evidence is in.

Mr. Schwarzbach: We are making a formal objection to all testimony that goes beyond the Illinois side. We will save a lot of time that way.

Asst. Comr. Nyka: The Commission will rule on that question when the time comes up for argument in the case."

All of these motions and objections on jurisdictional questions were taken under advisement by the Commission and considered by it in making its final order; and, among other things, there appears in the order of the Commission (Tr. 2—17), the following: "It is further ordered that the motion of respondent to dismiss this proceeding for want of jurisdiction be, and the same is hereby denied."

Furthermore, Commissioner Olson dissented from the

order of the Commission relative to the bridge runs and filed a written dissenting opinion, which appears in full (Tr. 2—18 to 21). It clearly shows that the jurisdictional question and the constitutional question relative to interstate commerce was not only presented to the Commission, but was considered and passed upon by it. Commissioner Olson dissented on the ground stated in his opinion—that to enter the order as to the bridge runs would cause an undue burden on interstate commerce.

Furthermore, the order of the Circuit Court of St. Clair County (Tr. 2—269, 270) shows that this jurisdictional question was considered and passed upon by the Circuit Court, and that the Circuit Court set aside the order of the Commission on the ground that it was an interference with interstate commerce and beyond the jurisdiction of the Commission.

In support of its contention that the cost of furnishing, maintaining and operating caboose cars would be so unreasonable because of the exorbitant expense required in order to comply with it, and the benefits derived therefrom would be so disproportionate to the cost thereof, as to constitute a taking of appellant's property without due process of law, in violation of the provisions of the 14th Amendment to the Constitution of the United States, it would take a hundred pages in this statement to quote the evidence offered and received relative to this subject and the objections thereto. For example, evidence was received and considered relative to the additional expense of furnishing caboose cars and the benefits accruing to the employes by reason thereof. At least half of the voluminous record is devoted to testimony on this subject.

Examples of this testimony are shown by certain exhibits, all of which were explained and amplified by extensive testimony of the witnesses identifying them.

Exhibit 5 (Tr. 4—27) shows the maximum running time allowed on certain runs. This was amended as shown by appellant's Exhibit 6.

Exhibits 7, 8 and 9 (Tr. 4—29, 30) contain other changes in running time.

Exhibit 10 (Tr. 4—30) is a tabulation of distances between the various yards in Illinois.

Exhibit 15 (Tr. 4—31) is a table showing the average monthly temperatures from January, 1927, to December, 1936.

Exhibit 16 (Tr. 4—32) shows the number of cars delivered on a typical day, viz: June 9, 1938.

Exhibit 18 (Tr. 4—32) shows the taxes paid by appellant in Illinois in 1936, amounting to more than half a million dollars.

Exhibit 19 (Tr. 4—32) shows injuries by sudden stop to switchmen in or on cabooses and cars in the rear of freight trains from 1928 to 1936, showing eight injured in cabooses, seven injured while riding cars during that period, and only one while riding on the rear end of trains.

Exhibit 20 (Tr. 4—32) shows the number of revenue cars handled by appellant for each year from 1931 to 1937, showing from 800,000 to 1,100,000 cars handled each year.

Exhibit 22 (Tr. 4—33) shows the income statement of appellant for seven years, ended December 31, 1937, showing net loss for the seven years of over $1,300,000, or an average loss for the seven years per year of over $188,000, with operating revenues for the seven years of over $50,000,000.

Exhibit 23 (Tr. 4—33) is a consolidated income statement for 1938, showing similar losses.

Exhibits 24 and 25 (Tr. 4—33) show comparative balance sheets as of July 31, 1938, and July 31, 1937, showing investments of approximately $73,000,000.

Exhibit 26 (Tr. 4—34) shows the net income or deficit of appellant for ten years, the net deficit for the ten years being nearly $1,200,000, or an average annual deficit for the ten years of nearly $120,000.

Exhibits 28 to 34 (Tr. 4—34, 35) are temperature readings.

Exhibit 35 (Tr. 4—35) is the agreement between appellant and the Bureau of Animal Industry of the United States relative to maximum time allowed for transporting livestock from different points in St. Louis and Illinois to National Stock Yards.

Exhibits 36 and 37 (Tr. 4—36, 37) are statements showing movement in and out of East St. Louis yards during a typical 24-hour period.

Exhibit 38 (Tr. 4—38, 39) shows service buildings and equipment at various parts in the yards.

Furthermore, when appellant was offering Exhibit 18, the following occurred (Tr. 4—14, 15):

> "Mr. Campbell: In view of the decision of our Supreme Court in 364 Ill. 213, and financial conditions which otherwise might be considered in a matter of this kind, to be followed up by other testimony, this merely being one of the items, I want to offer Exhibit 18 in evidence. I will prove the authenticity of it if you desire. It will be followed by substantiating testimony as to the cost to the company of what is described here.
>
> "Mr. Schwarzbach: I will make the objection that it is absolutely immaterial, in my opinion, when it comes to the question of safety. If it were a question of rate increase, it would be very material, but for the purpose of safety to the switchmen and the employes and the public, the question of cost is not material. There are a number of cases along that line.
>
> "Mr. Campbell: The Supreme Court has held if an order would impose onerous conditions, that is a fact that may be considered. We will have to follow that up with testimony.
>
> "Mr. Schwarzbach: I object very strenuously to it.

"Assistant Commissioner Nyka: Objection overruled. It may go in for consideration of the Commission. The Commission is a fact-finding body and will consider evidence as to finance. It may go in for what it is worth. It might not enter into the safety proposition, but it may be admitted for what it is worth.

"Mr. Schwarzbach: Subject to our objection?

"Assistant Commissioner Nyka: Subject to your objection."

Appellant prevailed in the Circuit Court. Appellees were the appellants in the Supreme Court of Illinois. Consequently appellant filed no assignment of errors in the Supreme Court, nor was it permitted so to do by the rules of the Supreme Court of Illinois. Neither did appellant file any cross-appeal because none was allowed or permitted. Appellant, however, did avail itself of the right it had, without filing cross-errors or a cross-appeal, to endeavor to sustain the order of the Circuit Court on any possible ground. The Circuit Court passed upon only one of appellees' contentions, and that was all it was required to pass upon. Appellant was therefore permitted to raise any point in the record that would sustain the judgment of the Circuit Court, whether the Circuit Court passed upon that contention or not. We quote from People v. Bradford, 372 Ill. 63, l.c. 65, 66, where the Supreme Court of Illinois said:

"Moreover, it was unnecessary for appellees to cross-appeal in order to save for review all the defenses interposed in their answer. The judgment appealed from was for appellees, and no part of it was adverse to them. They were, therefore, in no position to prosecute a cross-appeal. Having obtained all the relief they deemed themselves entitled to, they may sustain the judgment upon any ground warranted by the record, though they may wish to show the court below erred in not giving it to them on different or additional grounds (Bullman *v.* Cooper, 362 Ill. 469; McCaskill, Civil Practice Act Ann. 1936 (Supp.), p. 209)."

The rules of the Supreme Court of Illinois no longer provide for the filing of assignments of errors. Appellees, as a part of their brief, set forth the alleged errors relied upon for reversal, and appellant set forth its contentions as a part of its brief in the Supreme Court of Illinois. So far as the Federal questions are involved, appellant in its contentions raised in the Supreme Court of Illinois all of the Federal constitutional questions now presented. The opinion of the Supreme Court of Illinois shows (Tr. 7 to 20) that this question was raised and was considered and passed upon by the State Supreme Court.

Furthermore, the Supreme Court of Illinois considered and passed upon every Federal constitutional question now raised upon this appeal, and passed upon the same contrary to appellant's contentions that the order of the Commission was invalid and repugnant to the interstate commerce clause of the Constitution of the United States, and to the due process clause contained in the 14th Amendment thereto. Even if the questions had not been raised in the lower courts (which they were), when the Supreme Court of Illinois passed upon these Federal constitutional questions, jurisdiction was conferred by the Supreme Court of the United States to review the decision of the Supreme Court of Illinois. Some late cases in support of this point are: *Northwestern Bell Telephone Co.* v. *Nebr. St. Ry. Com.*, 297 U. S. 471, and *Whitfield* v. *State of Ohio*, 297 U. S. 431.

It is immaterial whether or not a Federal question was raised in the State trial court where questions were passed upon by State appellate courts. *Home Ins. Co.* v. *Dick*, 281 U. S. 397.

The Supreme Court of Illinois in its opinion (Tr. 10) recognized that these questions were to be determined by the Supreme Court of the United States, and said: "The question involved in this case is one of power of the Commerce Commission. The question of whether a statute of

a State or an order of the Commission acting within authority conferred upon it by the General Assembly of the State, imposes a direct burden upon interstate commerce, is one of which the Supreme Court of the United States is the final arbiter."

Therefore, it appears conclusively that all of the Federal constitutional questions now raised on this appeal were not only raised before the Commission, the Circuit Court and in the Supreme Court of Illinois, but also all of them were definitely passed upon by the Supreme Court of Illinois and contrary to appellant's contentions, and sustaining the validity of the order of the Commission, as opposed to the grounds then and now presented.

Statement of grounds upon which it is contended that the Federal questions involved are substantial, and the way they were passed upon by the Supreme Court of Illinois, and principles and decisions under which appellant contends that the Federal questions involved are substantial.

In the Supreme Court of Illinois there was drawn in question the validity of the order of the Illinois Commerce Commission, which, as heretofore pointed out, has been held by the Supreme Court of the United States to be a State statute within the meaning of the Constitution of the United States and the Acts of Congress regulating the jurisdiction as to appeals of the Supreme Court of the United States, on the ground that the order was repugnant to the Constitution and the laws of the United States. The decision of the Supreme Court of Illinois was in favor of the validity of such order (statute) in the face of the contention of appellant that the order (statute) was invalid and repugnant to the Federal constitution, and particularly to that part of Sec. 8 of Article I relative to regulation of interstate commerce and the 14th Amendment relative to deprivation of property without due process of law. Consequently, if the

Federal questions involved are substantial, then the order of the Commission and its validity on the ground stated may be reviewed by the Supreme Court of the United States on appeal.

The validity of said order of the Illinois Commerce Commission so far as substantial Federal questions and repugnance to the Constitution of the United States are concerned, was drawn in question and considered and decided by the Supreme Court of Illinois in the following respects:

A. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois, that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 35 were concerned, viz: the bridge runs, for the reason that even if Congress had not legislated upon the subject, the effect of the order as to such runs was and is a direct burden on interstate commerce and directly burdens or impedes interstate traffic, or impairs the usefulness of facilities for such traffic; and because said order as a necessary effect compelled a like compliance in the State of Missouri where the Illinois Commerce Commission had and has no power, jurisdiction or authority. Appellant contended that such a direct burden on interstate commerce was repugnant to the interstate commerce clause of the Constitution of the United States, viz: Sec. 8 of Article I thereof. The Supreme Court of Illinois directly passed on this question in favor of the validity of the order of the Illinois Commerce Commission.

B. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois,

that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 34 were concerned, viz: the inter-yard runs in Illinois which contained 98% of interstate freight, for the reason that even if Congress had not legislated upon the subject, the effect of the order as to such runs and resulting delays in said runs were and are a direct burden on interstate commerce and directly burdens or impedes interstate traffic, or impairs the usefulness of facilities for such traffic. Appellant contended that such a direct burden on interstate commerce was repugnant to the interstate commerce clause of the Constitution of the United States, viz: Sec. 8 of Article I thereof. The Supreme Court of Illinois directly passed on this question in favor of the validity of the order of the Illinois Commerce Commission.

C. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois, that Congress had taken charge of the field relative to the furnishing, maintenance and operation of caboose cars as to runs mentioned in both Findings 34 and 35, and that, inasmuch as Congress had taken charge of the field by appropriate legislation, a State cannot legislate in that field even though the effect upon interstate commerce is indirect, and even though Congress has not legislated as to the particular matters involved, the question being whether Congress has taken possession of the field, it being immaterial then whether or not it has legislated concerning a particular matter within the field. Appellant contended that for this reason the order of the Illinois Commerce Commission was invalid on the ground that it was repugnant to the Constitution of the United States, and particularly repugnant to the interstate commerce provisions of said Constitution contained in Sec. 8 of Article I thereof.

The Supreme Court of the State of Illinois passed on this contention in favor of the validity of the order of the Illinois Commerce Commission, as against the grounds and contentions set forth, and held that the said order was not repugnant to the commerce clause of the Constitution of the United States.

D. Appellant contended before the Illinois Commerce Commission, in the Circuit Court of St. Clair County, Illinois, and in the Supreme Court of the State of Illinois that the order of the Illinois Commerce Commission as to all of the transfer runs is unreasonable because of the exorbitant expense required in order to comply with it. Appellant further contended that such expense of compliance with the order was so exorbitant, when compared with the benefits accruing therefrom, and the said benefits was so disproportionate to the cost thereof, that consequently the enforcement of the order would deprive appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. Appellant further contended in the Supreme Court of Illinois, that, for the reasons set forth in this paragraph, the order of the Illinois Commerce Commission was invalid for the reason that it was repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto. The Supreme Court of the State of Illinois decided said contention in favor of the validity of the order of said Illinois Commerce Commission, and decided and found that such order was not repugnant to the 14th Amendment to the Constitution of the United States.

It is almost impossible literally to comply with paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States by citing pertinent quotations of specific facts of record because the opinion of the Supreme Court of Illinois is lengthy and practically every part of

it is pertinent to the facts found by the State Supreme Court. A copy of the opinion of the Supreme Court of Illinois is attached hereto and made a part of this statement, and it also appears in the transcript, pp. 7 to 20. However, we shall endeavor to comply with the rule by a summary of parts of the opinion and some pertinent quotations therefrom in order briefly to show the way the questions were passed upon by the State Supreme Court.

The State Supreme Court, after reciting the allegations of the complaint, correctly set forth (Tr. 7) the answer of appellant, as hereinbefore detailed. The Court then defined the railroad business in which appellant was engaged, recited the duties of the train crews, and particularly the duties of the one rear switchman who could use a caboose between yards, although he would be exposed to the same hazards the rest of the time; found the nature and character of the hazards that switchmen were subject to without cabooses, and showed the existence and use made of the two bridges across the Mississippi River and the inter-yard runs in Illinois. The opinion then sets up that all of the merchandise on the bridge runs is being transported in interstate commerce; and then the State Supreme Court said:

> "About sixty-eight passenger trains cross the Eads bridge each day. During the early part of each week about the same number of freight trains cross the bridge and later in the week the freight trains exceed the passenger trains in number. Approximately the same number of trains cross the Merchant's bridge each day.
>
> The Eads and Merchant's bridges span the Mississippi river between East St. Louis in Illinois and St. Louis in Missouri. Each bridge has thereon double track railroads connecting with appellee's yards. The Commerce Commission found that the boundary line

between the State of Illinois and the State of Missouri intersects the Eads bridge at a point about 1000 feet west of the west curb of Front street in the city of East St. Louis, and the Merchant's bridge about 775 feet west of the Illinois shore line when the river is at a stage of 2.4 feet." (Tr. 8).

The State Supreme Court then separated the runs as found by the Commission in Findings 34 and 35, and correctly summarized the finding and judgment of the trial court and the one question which the trial court passed upon, and held that the Circuit Court was right in setting aside the entire order when it concluded that any one part of such order was bad. The Supreme Court of Illinois then said:

"The principal question in the case concerns the validity of the order of the commission requiring cabooses for these runs over the bridge. Though the commission's order applies only to cuts of cars moving within the State, it is argued by appellee, and not disputed, that the only practical way in which the order can be carried out on runs across the river is to carry these cabooses across the bridge into appellee's yard on the opposite side of the river.

Appellants argue that notwithstanding the trains involved in order 35 are moving in interstate commerce, the attaching of cabooses thereto is not a direct burden on interstate commerce but affects it but indirectly or incidentally, and that the order lies within the inherent power of the State to enact reasonable regulations for the protection of the health, lives and safety of persons within its confines. It is urged that only when Congress has acted is the power of the States impaired, and then only to the extent that their regulations shall not be such as to be in conflict with or repugnant to the action so taken by Congress. Appellee insists that the order based upon finding No. 35 as to the bridge runs is an undue burden upon, and a regulation of, interstate commerce, in violation

of the commerce clause of the Federal constitution, and takes appellee's property without due process of law.

It is settled by decisions of the Supreme Court of the United States that a State can do nothing which will directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic. (Atlantic Coast Line Railroad Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230; Austin v. Tennessee, 179 id. 343, 45 L. ed. 224; Illinois Central Railroad Co. v. Illinois, 163 id. 142, 41 L. Ed. 107). It is equally well settled that State or local enactments, passed in the exercise of the police power of the State, in the interest of the public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce, are valid. Minnesota Rate cases, (Simpson v. Shepard,) 230 U. S. 352, 57 L. ed. 1511, and the cases therein cited.

The question involved in this case is one of power of the Commerce Commission. The question whether a statute of the State or an order of the commission acting within the authority conferred upon it by the General Assembly of the State, imposes a direct burden upon interstate commerce, is one of which the Supreme Court of the United States is the final arbiter." (Tr. 9, 10).

The Court then discussed the question of the right of the State under the police power to make laws promoting the peace and good order of society, for the preservation of life and health, or conducive to the comfort, convenience and welfare of the people; and then said:

"Notwithstanding acts coming within this reserve police power operate on the movements of interstate commerce and persons engaged therein, such law is nevertheless valid unless its effect is to directly lay some burden or restriction on interstate commerce which would not otherwise exist. (Hennington *v.* State of Georgia, 163 U. S. 299, 41 L. Ed. 166; Minneapolis

and St. Louis Railroad Co. *v.* Emmons, 149 Id. 364, 37 L. 769; People ex rel. Stead *v.* Chicago, Indianapolis and Louisville Railway Co., 223 Ill. 581.) Though by the Federal constitution Congress is given exclusive power to regulate commerce, the States may, in the exercise of the police power, make reasonable rules in regard to the method of carrying on interstate business within the State, such as to provide precautions that shall be used to avoid danger to those engaged in interstate commerce within the State, or to the public, or may designate facilities for the comfort of passengers and employees, safety of freight carried, and the like. The test of the validity of such enactments or orders is whether they are consistent with the general requirement that interstate commerce shall—free and unobstructed. If they are, they do not amount to a regulation of such commerce. Houston and Texas Central Railroad Co. *v.* Mayes, 201 U. S. 321, 50 L. Ed. 772.

The fact that a railroad may be engaged in both interstate and intrastate commerce, does not prevent a State from adopting such regulations as it may deem proper to provide for the safety of the men engaged in carrying on intrastate commerce, if such regulations are not inconsistent with or repugnant to acts of Congress adopted for the regulation of railroads engaged in interstate commerce. (Luken *v.* Lake Shore and Michigan Southern Railway Co., 248 Ill. 377; People *v.* Chicago, Indianapolis and Louisville Railway Co., supra; Missouri Pacific Railway Co. *v.* Kansas, 216 U. S. 262, 54 L. Ed. 472.) It not only lies within the power of the State, but it is its duty, to establish such regulations as are reasonable and necessary for the safety of those engaged in the business conducted within the State. The rule is settled that so long as Congress does not occupy the field of regulation to be considered in a given case, each State is empowered to make regulations within that field regarding the safety of persons engaged in interstate commerce that passes through the State. Such regulations do not purport to regulate interstate commerce, but to care for the safety of per-

sons within its borders. Chicago, Rock Island and Pacific Railway Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290" (Tr. 10, 11).

The Court then said:

> "We do not doubt the power of the Commerce Commission, delegated to it by the General Assembly under the police power, to make reasonable regulations protecting the health, safety and welfare of those engaged in appellee's switching business, so long as such regulations do not constitute an attempt to regulate, or do not directly burden interstate commerce, or run counter to Federal regulations on the subject. Appellee says these orders are attempts to regulate interstate commerce and constitute a direct burden upon such commerce and so are void for want of jurisdiction in the commission to promulgate them. It is not claimed that the Congress has specifically legislated on the subject of its use of these cabooses though it is argued that Congress has preempted the field" (Tr. 12).

It then recited that the Circuit Court did not pass upon the validity of Finding 34 of the Commission, but that inasmuch as both parties had briefed the question as to Finding 34, as well as that as to Finding 35, which involved the bridge runs, it became necessary to pass upon the validity of the order as to the runs defined in each of the findings. The Supreme Court of Illinois then said:

> "Whether either of these findings and orders of the commission are valid, depends in the main upon whether compliance with such orders lays a direct burden on interstate commerce. Where the effect of an intrastate transaction or regulation, as applied to interstate commerce, is merely indirect, the regulation producing such transaction remains within the domain of the State power" (Tr. 12, 13).

The Supreme Court held, after discussing the case of *Schechter* v. *United States*, 295 U. S. 495, as to the distinc-

tion between a direct and indirect effect or burden on interstate commerce:

"Counsel argue as to both findings No. 34 and No. 35 of the Commission's order that they are a burden on interstate commerce in that they require an additional amount of time to attach and detach these cabooses and are unreasonable in that they involve a very large additional expense to appellee, and so constitute an unwarrantable interference with interstate commerce. The evidence before the commission as to the amount of time consumed was in conflict, ranging from eleven minutes to forty minutes per movement, though appellant concedes that some time is required to add a caboose to these cuts of cars. It is argued that time required to comply with this order may, at times, involve appellee in penalties for failure to comply with certain regulations governing the transportation of perishable goods and livestock. It does not appear, however, that such is a necessary result nor that such results cannot be avoided by arrangement of train schedules. We are of the opinion that the record in this case does not establish that time consumed in complying with this order is so great as to amount to a regulation of interstate commerce or a direct burden upon it. The order does not purport to do so but was obviously promulgated to protect the lives and health of citizens of this State engaged in appellee's business within the State.

As to finding No. 35, which involves cuts of cars taken across the river into Missouri, counsel for appellee earnestly argue that since there are no means of leaving a caboose at the State line, where it could be picked up on return, the only practical way in which compliance with the order of the commission may be had is to carry such caboose with the cut of cars into its yards in Missouri and attach it in Missouri, and bring it back over the bridges so as to comply with the order within the State. This, appellee contends, is, in practical effect, a regulation of the movements

of the appellee's trains in the State of Missouri, which is beyond the power of this State or its commission" (Tr. 13, 14).

The Court then discussed the case of *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, and *Missouri Pacific R. R. Co.* v. *Norwood*, 283 U. S. 249, and attempted to distinguish the case of *A. T. & S. F. Ry.* v. *LaPrade*, 2 Fed. Supp. 855 (a three-judge court decision), and *South Covington & Cincinnati St. Ry. Co.* v. *Covington*, 235 U. S. 537, two of the cases relied upon by appellant. The Court then stated succinctly one of the issues involved, as follows:

> "Does the fact, if such be a fact, that the only practical method of complying with the order would be to haul these cabooses into Missouri, of itself render the order of the commission invalid as a direct burden upon interstate commerce?" (Tr. 17),

and discussed *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628, and *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280, and then said:

> "While none of the cases cited or herein discussed are entirely analogous on the facts, we think those cases which consider State exercise of police power for the safety of citizens of the State, bear a stronger analogy to the case before us on the facts, than do those in which the laws or orders bore a closer identity with regulation of interstate traffic as such. It does not appear that this order was directed against interstate commerce, nor does it deny equal protection of the laws. On its face, it must be taken as not so directed, but as the exercise of the power and duty inherent in the State to protect its citizens. It purports on its face to apply to train movements within the State, and the fact that it does affect interstate shipments or cuts of cars crossing from this State into the State of Missouri, results, in our opinion, under the facts of this case, in an incidental effect only upon interstate commerce.

Counsel for appellee say that the carrying out of this order would involve so large an expense as to affect its efficiency in the discharge of its duties as an interstate carrier. The question of expenses of labor involved and the purchase of cabooses was one of sharp dispute in the testimony. We are of the opinion that those expenses, on this record, are to be classed with those inconveniences referred to in the cases herein cited as not affecting the power of the State to impose the regulation, unless so clearly unreasonable as to be beyond State power. This record does not so indicate" (Tr. 18, 19).

The Court then summed up its conclusions as follows (Tr. 19, 20):

"That there is substantial danger to switchmen that can be avoided by these cabooses or shelter cars, seems clear. We are of the opinion that the order of the Commerce Commission lay within the police power of the State; that such power has been delegated to that commission, to protect the lives, health and welfare of those engaged in the work of switching cars on the runs carried out by the appellee, and that it was not beyond the power of the commission to enter finding No. 35 of its order requiring cabooses to the State line for those movements which crossed the bridges, and that such regulations do not directly burden interstate commerce.

The reasons and authorities cited in determining the validity of finding and order No. 35 must apply in the main to finding and order No. 34, which requires cabooses on interyard movements within the State. Much that has already been said in the consideration of this case applies to finding and order No. 34 and need not be repeated" (Tr. 19, 20).

Summing up the conclusions of the Supreme Court of the State of Illinois, the court decided:—

1. That Congress had not taken charge of the field, viz: the matter of cabooses.

2. That inasmuch as Congress had not taken charge of the field, the State had the right to pass legislation indirectly affecting and constituting an indirect burden on interstate commerce, and that the only limitation of the right of the State was that it could not pass legislation that would result in a direct burden on interstate commerce.

3. That even with the findings as to expense and delays, and with the finding that the effect of the order as to the bridge runs was to require, as a practical proposition, compliance with the order in Missouri, such facts did not constitute a direct burden on interstate commerce, but only indirectly burdened and affected same. This applies to the bridge runs covered by Finding 35.

4. That as to the inter-yard runs in Illinois, which contained 98% interstate freight, the extra expense and the delays incident to interstate transportation constituted only an indirect burden on interstate commerce and did not create a direct burden thereon or directly affect the same.

5. That the expense of compliance with the order was not so exorbitant, when compared with the benefits accruing therefrom, and the said benefits were not so disproportionate to the cost thereof, as to deprive appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

6. That the order, because it is limited to the confines of the State of Illinois, does not purport to regulate interstate commerce, and that its effect must be determined from what it purports to do and not from what actually results. Such a conclusion is contrary to the rules of law laid down in *South Covington Ry. Co.* v. *Covington*, 235 U. S. 537, l.c. 545; *Southern Pac. R. R. Co.* v. *R. R. Commission*, 10 F. Supp. 918; *A. T. & S. F. Ry. Co.* v. *LaPrade*, 2 F. Supp. 855; *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50,

and *Shafer* v. *Farmers' Grain Co.*, 268 U. S. 189. It is also contrary to the decision in *People* v. *Cross*, 361 Ill. 405.

As we understand the law, if Congress has taken charge of the field, a State cannot legislate in that field, even though the effect upon interstate commerce is indirect, and even though Congress has not legislated as to the particular matters involved. The question is whether Congress has taken possession of the field, and it is immaterial then whether it has legislated concerning a particular matter within the field. In support of this statement we cite: *Penn. R. R. Co.* v. *Public Service Com.*, 250 U. S. 566; *Southern Ry. Co.* v. *R. R. Com. of Ind.*, 236 U. S. 439; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605. To the same effect are: *Staten Island Rapid Transit Co.* v. *P. S. C.*, 16 F. (2d) 313; *Southern R. Co.* v. *U. S.*, 222 U. S. 20, 56 L. Ed. 72; *Texas & Pacific R. Co.* v. *Rigby*, 241 U. S. 33, 60 L. Ed. 874; *Northern Pacific R. Co.* v. *Washington*, 222 U. S. 370, 56 L. Ed. 237; *Erie R. Co.* v. *New York*, 233 U. S. 671, 58 L. Ed. 1149; *Oregon-Washington R. & N. Co.* v. *Washington*, 270 U. S. 87, 70 L. Ed. 482; *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341, 71 L. Ed. 672; *C. & W. C. R. Co.* v. *Varnville F. Co.*, 237 U. S. 597, 59 L. Ed. 1137; *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 57 L. Ed. 314; *Prigg* v. *Pennsylvania*, 10 L. Ed. 1060; *Houston* v. *Moore*, 50 L. Ed. 19, as well as the cases heretofore cited.

In *Penn. R. R. Co.* v. *Public Service Com.*, 250 U. S. 566, the Supreme Court of the United States held that Congress had taken charge of all matters connected with the construction of cabooses and mail cars, and that the States were powerless to legislate. The logical result of this decision is that Congress has taken full jurisdiction of the matter of cabooses, including their construction, equipment, where they shall be placed in the trains, and whether they shall be placed at all on trains. The dissenting opinion of Mr. Justice Clark, l.c. 570, acknowledges this construction of the majority opinion.

The Supreme Court of Illinois in previous decisions had likewise sustained our position upon this point. *Staley* v. *I. C. R. R. Co.*, 268 Ill. 356; *People* v. *I. C. R. R. Co.*, 324 Ill. 591; *St. Louis C. R. Co. v. Blumberg*, 325 Ill. 387, and *Gamble-Robinson Co.* v. *U. P. R. Co.*, 262 Ill. 400.

The undisputed evidence shows that the furnishing of cabooses was a working condition that had always been determined by contract between appellant and its employes. Under the amended Railway Labor Act of June 21, 1934, U. S. C. A. Vol. 45 Supp., beginning on page 235, it appears that Congress, by the passage of that act, conferred upon the National Railroad Adjustment Board full jurisdiction for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions. Congress has also taken jurisdiction of the field by the passage of the Car Service provision (paragraphs 10 to 17, incl., and paragraph 21 of Sec. 1 of the Interstate Commerce Act) 49 U. S. C. A., par. 1 (10-17, 21); by the Boiler Inspection Act, 45 U. S. C. A., sec. 22, et seq.; the Power Brake provision of the Safety Appliance Act, 45 U. S. C. A., sec. 1, et seq.; by Sec. 26 of the Interstate Commerce Act, 49 U. S. C. A. 26, and by Sec. 439 of the Transportation Act of 1920, as construed by the Supreme Court of the United States in *Dayton-Goose Creek Ry. Co.* v. *U. S.*, 263 U. S. 456, 478. Sec. 439 of the Transportation Act was inserted in the Interstate Commerce Act as Sec. 20a (49 U. S. C. A., Sec. 20a), and subjects to the approval of the Interstate Commerce Commission all issues of securities or other evidences of indebtedness. The effect of this enactment was discussed by this Court in *R. R. Com.* v. *Southern Pacific Ry. Co.*, 264 U. S. 331.

Furthermore, we conceive it to be the law, and the Supreme Court of Illinois so recognizes the fact, that if a State enactment imposes a direct burden on interstate commerce it must fall, regardless of Federal legis-

lation. The point of such an objection is not that Congress has acted but that the State has directly restrained that which in the absence of Federal regulation should be free. In other words, if Congress has taken possession of the field, the State cannot regulate at all concerning interstate traffic, but even if Congress has not taken possession of the field, a State cannot legislate if its enactment imposes a direct burden on interstate commerce.

Minnesota Rate Cases, 230 U. S. 352-396;
Lemke v. *Farmers' Grain Co.*, 258 U. S. 50;
Shafer v. *Farmers' Grain Co.*, 268 U. S. 189;
Buck v. *Kuykendall*, 267 U. S. 307;
C. B. & Q. R. Co. v. *R. R. Com.*, 237 U. S. 220;
K. C. Ry. Co. v. *Kaw Valley Drainage Dist.*, 233 U. S. 75;
U. S. v. *Southern Ry. Co.*, 222 U. S. 20;
Southern Ry. Co. v. *R. R. Com. of Ind.*, 236 U. S. 439;
South Covington & Cincinnati Ry. Co. v. *Covington*, 235 U. S. 537.

Under these decisions, and particularly the case of *South Covington & Cincinnati Street Ry. Co.* v. *Covington*, 235 U. S. 537, we submit that the effect of the order of the Illinois Commerce Commission as to the bridge runs constitutes a direct burden on interstate commerce. The latter case held invalid certain provisions of an ordinance of Covington, Kentucky, which, through its very nature, in order to be complied with in Covington, Kentucky, necessarily had to be complied with in Cincinnati. The same situation exists in the instant case.

Attention is also called to the case of *A. T. & S. F. Ry. Co.* v. *LaPrade*, 2 Fed. Supp. 855, a three-judge court decision involving the train limit law of Arizona, and also to the case of *Southern Pacific R. R. Co.* v. *R. R. Com. of California, et al.* (Brotherhood of Railroad Trainmen,

et al., intervenors), reported at 10 F. Supp. 918, a decision of another three-judge court. This was an order requiring cabooses under certain conditions, where compliance with it required cabooses in a State other than the one entering the order or the building of a switch-track costing $6700.00. The three-judge court held that such an order was invalid and repugnant to the interstate commerce section of the Constitution of the United States.

As to the runs covered by Finding 34, viz: the interyard runs, containing 98% interstate commerce, the same situation exists as to the bridge runs, except that on these runs the practical effect of the order would not be to compel cabooses to be attached to trains for several miles in Missouri. All of the other features covered by the above decisions apply to these runs covered by Finding 34, as well as the bridge runs covered by Finding 35.

It is further submitted, and the Supreme Court of Illinois held otherwise, that the benefits accruing by putting this order in effect are so disproportionate to the expense involved, and the cost so exorbitant compared to the benefits, that it constitutes a deprivation of appellant's property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States. In support of our position in this respect, we cite: *Colorado* v. *U. S.*, 271 U. S. 153; *Panhandle Eastern Pipe Line Co.* v. *State Highway Com.*, 294 U. S. 613; *Penn. Coal Co.* v. *Mahon*, 260 U. S. 393, to the effect that "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"; *Great Northern R. R. Co.* v. *Minnesota*, 238 U. S. 340, to the effect that any act requiring the expenditure of money upon the part of a railroad company involves the taking of its property, and the question whether this is done with or without due process of law depends upon the

special circumstances. We further cite *State of Washington ex rel. Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, and *C. B. & Q. R. R. Co.* v. *Commerce Com.*, 364 Ill. 213.

The following cases, among many, also support the above rules:

Southern Railway Co. v. *Virginia*, 290 U. S. 190, 78 L. Ed. 260;

Georgia Power Co. v. *Decatur*, 281 U. S. 505, 74 L. Ed. 999;

Norfolk & W. Railroad Co. v. *P. S. C.*, 265 U. S. 70, 68 L. Ed. 904;

Chesapeake & Ohio Ry. Co. v. *P. S. C.*, 242 U. S. 603, 61 L. Ed. 520;

Miss. R. R. Com. v. *M. & O. R. Co.*, 244 U. S. 388, 61 L. Ed. 1216;

C. M. & St. P. R. R. v. *Wisconsin*, 238 U. S. 491, 59 L. Ed. 1423;

C. B. & Q. Ry. v. *Wisconsin R. R. Com.*, 237 U. S. 220, 59 L. Ed. 926;

Mo. Pac. Ry. Co. v. *Kansas*, 216 U. S. 262, 54 L. Ed. 472;

Atlantic Coast Line v. *N. Car. Corp. Com.*, 206 U. S. 1, 51 L. Ed. 933;

Chicago & N. W. Ry. v. *Ochs*, 249 U. S. 416, 63 L. Ed. 679;

Wisconsin M. & P. R. Co. v. *Jacobson*, 179 U. S. 287, 45 L. Ed. 194;

C. B. & Q. Ry. Co. v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979.

The Federal questions passed upon by the Illinois Supreme Court are not only substantial but are also important. The effect upon appellant is great not only in added expense but also in delay to interstate shipments. Furthermore, this Court wil take judicial notice of the large number

of railroads in this country engaged in transporting interstate freight. If a precedent is set in this case that sustains such a direct burden on interstate commerce, it is undoubtedly true that other States will follow with like regulations and consequent burdens. In such a case, the general effect all over the nation would be great. The importance of finally and decisively settling these questions by a decision of this Court is apparent, and the impelling necessity of such a decision is obvious.

We, therefore, submit, on the question of jurisdiction of the Supreme Court of the United States of this cause on appeal, that this case involves the validity of a statute of the State of Illinois as repugnant to the Constitution of the United States; that the Supreme Court of Illinois passed upon these questions and sustained the validity of the statute as against the constitutional grounds urged against it; that the Federal questions raised are substantial and ought to be decided by the Supreme Court of the United States, and that, therefore, substantial Federal constitutional questions being presented, coming within the purview of Sec. 237 of the Judicial Code, the Supreme Court of the United States has full jurisdiction of this case on appeal.

All of which is respectfully submitted.

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APPENDIX "A".

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION.

26601.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

Complaint in the matter of failure to provide caboose cars for switchmen in the East St. Louis switching district.

Order.

BY THE COMMISSION:

On March 4, 1938, the Brotherhood of Railroad Trainmen of Illinois, complainant herein, filed a complaint with the Commission alleging the failure of the Terminal Railroad Association of St. Louis, respondent herein, to provide caboose cars for switchmen in the territory in, around and about East St. Louis, Illinois. The complaint filed herein further alleges that as a result of the failure to provide the said caboose cars, the switchmen, in the performance of their duties on transfer trains, are necessarily required to ride on the draw bar in between freight cars, or on the top of, or on the side of freight cars where numerous reduced vertical and horizontal clearances prevail.

The complaint further alleges that the life, health and safety of the aforesaid switchmen of transfer cars and of other employees of said respondent and of the public are endangered by the aforesaid failure to provide the said caboose cars within the State of Illinois.

On April 6, 1938, respondent herein filed its answer to the above described complaint in which it is expressly denied that the Commission has any power, right or jurisdiction to enter any order in regard to the subject matter of this complaint so far as any movements in interstate

commerce are concerned. Respondent further, in its answer, says that it now provides all of the facilities mentioned in the complaint that are reasonably necessary for the health, safety and life of its employees.

The answer further states that so far as interstate movements of trains or cuts of cars are concerned, this Commission has no power, jurisdiction or authority to enter any order requiring cabooses for interstate runs between the State of Illinois and the State of Missouri, and respondent, in its answer, expressly raises said question of the jurisdiction of the Commission so far as any interstate runs or movements are concerned.

Pursuant to notice as required by law, and by the rules and regulations of the Commission, this matter came on for hearing at the offices of the Commission at Chicago, Illinois, on April 27, 1938. Further hearings were held from time to time at the Commission offices at Chicago and at Springfield, Illinois, and the case was marked "heard and taken" on December 7, 1939. Both parties in interest were duly represented by counsel at all hearings in this matter, and introduced evidence, both oral and documentary.

During the course of the proceedings the Commission directed its Chief Railroad Inspector, Mr. R. B. Thomas, to make an investigation of the subject matter of the complaint, to prepare a written report and submit the same to both parties, and to be available to testify and to be cross-examined by either or both parties The investigation was made, the report submitted in three sections, and Mr. Thomas testified on direct and cross-examination.

On June 29, 1939, respondent filed its brief on the question of jurisdiction. On July 15, 1939, complainant filed its brief in answer to the brief filed by respondent. On August 4, 1939, respondent filed a brief in reply to said brief filed by complainant.

The evidence shows that East St. Louis is a terminal point for several railroads operating in or through the State of Illinois. Practically every one of these railroads has at least one yard at East St. Louis or in the immediate vicinity thereof. Under the prevailing practice of the

industry, a large volume of business is carried on by the respective railroads among themselves, involving the movement of cars from the tracks or yards of one railroad to the tracks or yards of another, and this results in a large number of such interchanges daily. The territory within which these operations are performed constitutes a switching district.

The respondent herein is engaged in performing terminal services for these various railroads as well as for itself. The respondent itself operates in three principal yards in the East St. Louis switching district which are known as Central District or C. D. Yard, Madison Yard, and Wiggins No. 2 Yard, as well as in certain subsidiary yards. Interchanges are made to and from these yards either altogether or in part by respondent. In some instances the interchange in one direction may be handled by a railroad other than respondent. In addition to these operations the respondent directly serves certain industries in the East St. Louis switching district.

Each of respondent's aforementioned yards consists of a number of tracks over which the classification or sorting of railroad cars is accomplished. Interchanges received in these yards are classified with reference to the immediate disposition of the particular car, which may be its delivery to a certain industry by respondent or its delivery to a railroad other than the one from which the interchange originated.

The evidence further shows that interchange operations are carried on between St. Louis, Missouri, and the aforesaid three yards of respondent in Illinois via the Eads Bridge or the Merchants' Bridge. Both bridges span the Mississippi River joining the East St. Louis switching district with St. Louis, Missouri, and the bridges are approximately three miles apart. The boundary line dividing the State of Illinois from the State of Missouri intersects the Eads Bridge at a point about eleven hundred (1100) feet west of the west curb of Front Street in the City of East St. Louis, and it intersects the Merchants' Bridge at a point about seven hundred seventy-five (775) feet west of the Illinois shore line when the river is at a stage of —2.4 feet.

The evidence further shows that on the Eads Bridge in Illinois there are clearances restricted to such an extent that it is unsafe for a switchmen to ride the tops or sides of railroad cars on that portion of the bridge. It also appears from the record that the prevailing lateral clearances on a portion of the Merchants' Bridge in Illinois are such that it is unsafe for a switchman to ride the sides of cars thereon. The vertical clearances on that portion do not permit a switchman to stand erect on the tops of box cars. Some of the interchange movements over Merchants' Bridge by respondent and all of the interchange movements over the Eads Bridge by respondent are presently performed without caboose cars. The evidence further shows that under such circumstances the rear switchman on such interchange movements is compelled to ride on the rear draw bar of the rear car on that portion of the Eads Bridge in Illinois where the aforesaid restricted clearances prevail. On the Merchants' Bridge, however, the rear switchman may ride either the rear draw bar of the rear car or on the top of the rear car in a sitting position over that portion of the bridge in Illinois where the restricted clearances prevail.

The evidence further shows that at present, in making transfer, delivery or industry runs in Illinois without cabooses to or from its three yards in Illinois, respondent's rear switchmen are obliged to ride either the rear draw bar of the rear car or the top or side of that car; that in so riding the top, side or rear draw bar, the life, health, safety and comfort of said switchmen is endangered by the presence of snow, ice or rain, the inclemency of the weather, the sudden jerk or stop of the train, and the restricted clearances on the bridges. The evidence further shows that such danger would be obviated by the use of caboose cars on these runs.

The evidence is voluminous and varies widely upon the question of time delays, additional cost, and an adequate number of cabooses which would be occasioned by the requirement of caboose cars. From the evidence it appears that there are thirty-nine (39) transfer, delivery and industrial runs made by respondent in Illinois, exclusive of those runs made by way of Eads Bridge or Merchants'

Bridge, and exclusive of those runs presently provided with cabooses full time throughout the year. Four (4) of these thirty-nine (39) runs presently operate with cabooses between October 15 and May 1 of each year. These thirty-nine (39) runs vary in length from less than one-half mile to more than ten miles each way within the East St. Louis switching district.

The evidence shows that of these thirty-nine (39) runs there are twenty (20) in which the one-way distance traveled is in excess of two miles. It further appears that the said twenty (20) runs include the four (4) runs above mentioned that presently carry cabooses from October 15 to May 1. Also, it appears that there is a greater degree of need for caboose cars on the aforesaid twenty (20) runs and the runs via Eads Bridge or Merchants' Bridge than on the remainder of the said thirty-nine (39) runs made by respondent in the East St. Louis switching district. The degree of need is measured by a consideration of a multitude of facts, such as the amount of time that would be spent in a caboose if one were provided, the distance that is traveled in making a particular run, the character of the work performed by the crew members, the working conditions, the inclemency of the weather, prevalence of restricted clearances, etc., all of which affect the health, safety, comfort and convenience of the employees.

The evidence further shows that most of the other railroads operating in the East St. Louis switching district under conditions similar to those under which respondent operates, now use caboose cars.

The Commission having given due consideration to the petition, the answer, briefs and all the evidence, both oral and documentary introduced at the hearings in this matter, and being fully advised in the premises, is of the opinion and finds:

(1) that it has jurisdiction of the subject matter of this case and the parties hereto;

(2) that the Terminal Railroad Association of St. Louis, respondent herein, is a corporation engaged in the transportation of passengers and goods as a common carrier in the State of Illinois, and is a public utility as defined in

Section 10 of "An Act concerning public utilities as amended;

(3) that in and around the City of East St. Louis, Illinois, there exists an area in which a number of railroads perform many of their operations, and which is known as the East St. Louis switching district;

(4) that certain of the railroads, to wit: The Alton Railroad Company, The Baltimore and Ohio Railroad Company, the Chicago, Burlington & Quincy Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Illinois Central Railroad Company, the Litchfield and Madison Railway Company, the Louisville and Nashville Railroad Company, the Mobile and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, the Southern Railway Company, the Wabash Railway Company, the Alton and Southern Railroad, the St. Louis Southwestern Railway Company, The St. Louis and O'Fallon Railway Company, the St. Louis and Belleville Electric Railway Company and the Missouri Pacific Railroad Company, operating in or through the State of Illinois, maintain and operate at least one railroad yard in the East St. Louis switching district; that cars in the freight trains arriving in these yards are switched or classified and assembled therein by their own switching crews with reference to the respective routing of the said cars; that deliveries are made of the groups of cars so assembled and requiring transfer to the yards of other railroads;

(5) that the respondent railroad company maintains and operates three principal yards, namely, C. D., Madison and Wiggins No. 2, each consisting of a number of tracks ranging from ten (10) or less to seventy (70) or more cars in length, as well as certain subsidiary yards, within the confines of the said East St. Louis switching district, and in each of these principal yards, usually six to eight switching crews working in shifts of approximately eight hours each, are engaged continuously in switching, making transfers, and also render direct service to certain industries in the said district when necessary;

(6) that during the process of making certain of the aforesaid transfers, the cars are moved to one or more of the aforesaid respondent's yards, where further classification may or may not occur before final delivery to the receiving railroad has been completed; that delivery, transfer and industry runs consist of groups or cuts of cars varying from one or two to fifty or more cars in number;

(7) that respondent's switching crews assigned to C. D. Yard make transfers between C. D. Yard and the yards of the following railroads: The Alton Railroad Company, The Baltimore and Ohio Railroad Company, the Chicago, Burlington & Quincy Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Illinois Central Railroad Company, the Litchfield and Madison Railway Company; the Louisville and Nashville Railroad Company, the Mobile and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, the Southern Railway Company and the Wabash Railway Company;

(8) that respondent's switching crews assigned to Madison Yard make transfers between Madison Yard and the yards of the following railroads: The Pennsylvania Railroad Company, The New York, Chicago and St. Louis Railroad Company; the Litchfield and Madison Railway Company, the Alton and Southern Railroad, The St. Louis Southwestern Railway Company, the Illinois Central Railroad Company, the St. Louis and O'Fallon Railway Company, the St. Louis and Belleville Electric Railway Company, the Valley Terminal Railway, and the Illinois Terminal Railroad Company; that in addition, there are industrial runs made out of the Madison Yard, which are known as Granite City East side, Granite City West side and the Granite City combination; and also, deliveries are made by the Madison Yard crews to and from the National Stock Yards;

(9) that respondent's switching crews assigned to the Wiggins No. 2 Yard make transfers between Wiggins No. 2 Yard and the yards of the following railroads: the Missouri Pacific Railroad Company at Dupo, the Illinois Central Railroad Company, the St. Louis Southwestern Railway

Company, the Wabash Railway Company, The Baltimore and Ohio Railroad Company-The Alton Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Mobile and Ohio Railroad Company; the Litchfield and Madison Railway Company, the Chicago, Burlington & Quincy Railroad Company and The New York, Chicago and St. Louis Railroad Company; that in addition the aforesaid crews render industrial switching service to the Monsanto Chemical Company, the Phillips Petroleum Company, the Union Electric Company of Illinois (the Cahokia power plant); and also deliveries are made between Wiggins No. 2 Yard and the Madison Yard by the Wiggins No. 2 Yard crews;

(10) that there are two bridges that span the Mississippi River joining the East St. Louis switching district with St. Louis, Missouri, which are known as the Eads Bridge and the Merchants' Bridge;

(11) that some of respondent's crews are engaged in making transfers of trains to and from respondent's three yards in the East St. Louis switching district and St. Louis, Missouri, by way of the aforesaid bridges;

(12) that all such transfer movements to and from C. D. Yard over the Eads Bridge by respondent are made without caboose cars;

(13) that of such transfer movements over the Merchants' Bridge by respondent, bound to or from either the Madison Yard or the Wiggins No. 2 Yard, only one is provided with a caboose car, and that one so provided for only twenty-eight (28) weeks of the year;

(14) that the boundary line between the State of Illinois and the State of Missouri intersects the Eads Bridge at a point about eleven hundred (1100) feet west of the west curb of Front Street in the City of East St. Louis, and it intersects the Merchants' Bridge at a point about seven hundred seventy-five (775) feet west of the Illinois shore line when the river is at a stage of —2.4 feet;

(15) that the governing vertical clearance on both tracks of the Eads Bridge is sixteen feet two inches between top

of rails and overhead obstructions; that the governing lateral clearances on the north track of said bridge are six feet five and three-quarters inches to the north of the center line of said track, and seven feet one-quarter inch to the south of said center line; that the governing lateral clearances on the south tracks are substantially similar to those on the north track;

(16) that the governing vertical clearance on both tracks of the Merchants' Bridge is nineteen feet nine and one-half inches; that the governing lateral clearances on the north track of said bridge is six feet nine inches to the north of the center line of said track, and six feet eight inches to the south of the center line of the south track; that the distance between center lines of said tracks on said bridge is twelve feet one inch; that there are no fixed obstructions between the center lines of the said tracks on said bridge;

(17) that railroad cars varying between twelve feet ten inches and fifteen feet in height, and between ten feet and ten inches in width are moved by respondent over the Eads Bridge; that railroad cars varying between fourteen feet six inches and four een feet eleven inches in height, and between ten feet five inches and ten feet ten inches in width are moved by respondent over the Merchants' Bridge;

(18) that the side sway or rock of cars in motion further reduces the existing lateral clearances on the aforesaid bridges;

(19) that the governing clearances on the Eads and Merchants' Bridges are restricted to such an extent that the riding on the tops or sides of cars over said bridges is extra-hazardous;

(20) that one member of each of respondent's crews is required to ride the rear car of all delivery, transfer and industrial runs;

(21) that by reason of this requirement the rear switchman is obliged to ride either on the rear draw bar of the rear car, or the top or side of that car; that respondent's rule forbids switchman to ride inside loaded open top cars;

(22) that sudden jerks and sudden stops of the train commonly occur during the course of delivery, transfer or industrial runs; that rear switchmen have been injured by being dislodged and thrown from cars by such sudden jerks and stops;

(23) that during certain seasons of the year, the tops, sides, ends, draw bars, grab irons, and other appurtenances of cars are frequently covered with ice, sleet, snow or rain;

(24) that the presence of ice, sleet, snow or rain on cars as aforesaid contributes to and causes insecurity of footing and uncertainty in grasping and holding on to cars during the making of delivery, transfer or industrial runs;

(25) that without caboose cars, rear switchmen of respondent's crews are openly exposed to inclement weather in riding the tops, sides, end or draw bars of cars as aforesaid, and also that, at present, no facility is provided for the storage of safety devices, flagging equipment, lunches, drinking water, extra cothing, or for performing clerical work enroute on delivery, transfer, or industrial runs not now provided with caboose cars;

(26) that the train line air valve at each end of a car is located adjacent to the draw bar; that in cases of emergency the rear switchman stops the train by opening said valve;

(27) that, because of such location, a rear switchman riding the top or side of a rear car cannot readily or safely open said valve;

(28) that by reason of the matters and things set forth in findings 18 through 25, inclusive, the physical and mental condition of respondent's rear switchmen is materially adversely affected;

(29) that by reason of all the matters and things hereinabove set forth, the health, safety, comfort and convenience of respondent's rear switchmen is materially affected;

(30) that the furnishing, maintenance, and operation of caboose cars by respondent on its transfer, delivery and industrial runs will provide facilities that will shelter respondent's rear switchmen from inclement weather, afford convenient places for the storing of extra clothing, food, drinking water, first aid kits, flagging equipment and vari-

ous other devices, eliminate the necessity of the respondent's rear switchmen's riding the tops, sides, ends or draw bars of the rear cars, eliminate the hazards of restricted clearances as they affect respondent's rear switchmen, afford ready and safe accessibility to a train air line valve or the like;

(31) that the furnishing, maintenance and operation of caboose cars by respondent as aforesaid will promote and safeguard the security, safety, health, comfort, and convenience of respondent's rear switchmen during transfer, delivery and industrial run service;

(32) that in view of the distance traveled in making particular runs, the time required to make such runs, the character of the work performed by the crew members, the conditions and circumstances under which the work is performed, the inclemency of the weather, the prevalence of restricted clearances, the necessity of storage facilities and safety devices, and all the many facts that affect the health, safety, comfort, and convenience of the employees, the degree of need in the cases of twenty of the thirty-nine or more delivery, transfer or industrial runs made by respondent wholly within the State of Illinois, is such as to reasonably require that a caboose car be provided for each such run throughout the year;

(33) that for the same reasons as set forth in the preceding finding, the degree of need in the cases of the runs covered by findings 11, 12 and 13, is such as to reasonably require that a caboose car be provided for each such run throughout the year;

(34) that it is reasonable to require the respondent to furnish, maintain and operate caboose cars throughout the year on its transfer, delivery and industrial runs hereinafter grouped by yards. Each such run is identified by its common name:

(1) Central District Yard—

(a) Pennsylvania
(b) Mobile and Ohio
(c) Southern
(d) Illinois Central

(2) Madison Yard—

(a) C D Yard
(b) Granite City east side
(c) Granite City west side
(d) Granite City combination
(e) Alton and Southern-St. Louis and Southwestern
(f) Illinois Central
(g) St. Louis and O'Fallon Railway-St. Louis and Belleville Electric;
(h) Valley Junction;
(i) Pennsylvania

(3) Wiggins No. 2 Yard—

(a) Madison Yard
(b) Dupo
(c) Illinois Central
(d) St. Louis and Southwestern
(e) Monsanto Chemical
(f) Phillips Petroleum
(g) Cahokia

(35) that it is reasonable to require the respondent to furnish, maintain and operate caboose cars throughout the year on its transfer or delivery runs hereinafter described, in so far as these runs are operated within the confines of the State of Illinois:

(1) All runs into or out of C D Yard via Eads Bridge;

(2) Runs via Merchants' Bridge moving into or out of
(a) Madison Yard;
(b) Wiggins No. 2 Yard;

(36) that the cost of furnishing, maintaining and operating said caboose cars will not impose an undue, unreasonable or unfair burden upon the respondent, considering the fact that said cabooses are essential to promote the security, safety, health, comfort and convenience of respondent's rear switchmen;

(37) that the prayer of the complaint filed herein should be granted to the extent set forth in findings 34 and 35 of this order;

(38) that the remainder of the prayer of said complaint should be denied;

(39 that the motion of respondent to dismiss this proceeding for want of jurisdiction should be denied;

(40) that the motion of respondent to strike from the record all evidence introduced by Chief Railroad Inspector of the Commission should be denied; and,

(41) that the Commission should retain jurisdiction of the subject matter of this proceeding and the parties hereto for the purpose of entering such further order or orders as it may deem meet.

It Is Therefore Ordered that the Terminal Railroad Association of St. Louis, respondent herein, be, and it is hereby, required and directed to furnish, maintain, and operate caboose cars on its transfer, delivery and industrial runs, more specifically set forth in finding 34 of this order within sixty (60) days of the date of service of this order.

It Is Further Ordered that respondent herein be, and it is hereby, required and directed to furnish, maintain, and operate caboose cars on its transfer and delivery runs more specifically set forth in finding 35 of this order within thirty (30) days of the date of service of this order.

It Is Further Ordered that the motion of respondent to dismiss this proceeding for want of jurisdiction be, and the same is hereby, denied.

It Is Further Ordered that the motion of respondent to strike from the record all the evidence introduced by the Chief Railroad Inspector of the Commission be, and the same is hereby, denied.

It Is Further Ordered that the respondent shall make report in writing within five days after the caboose cars have been provided on the runs as required by the terms and conditions of this order, and shall mail such report or reports to the Secretary of the Commission.

IT IS FURTHER ORDERED that the Commission hereby retains jurisdiction of the subject matter of this proceeding and over the parties hereto for the purpose of entering such further order or orders as it may deem meet.

By order of the Commission at Chicago, Illinois, this 1st day of February, 1940.

(SEAL) (Signed) JOSEPH E. KNIGHT,
Secretary.

APPENDIX "B".

26601.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

Complaint in the matter of failure to provide caboose cars for switchmen in the East St. Louis switching district.

Dissenting Opinion of Commissioner Olson.

BY COMMISSIONER OLSON:

The order adopted requires cabooses to be attached to train movements, not only in the State of Illinois, but also to such train movements as use the Eads and Merchants Bridges between the States of Illinois and Missouri. I do not concur with that part of the order which requires cabooses to be attached to trains moving between the States of Illinois and Missouri. While the order is limited to the movement within the State of Illinois, it is careful to mention the number of feet on each bridge from the Illinois side which it considers to be within the territory of the State of Illinois. It is impracticable for a caboose to be attached to a train of cars and proceed only to what the order considers the Illinois limit, because such caboose, by the very nature of the operation, must continue on to the State of Missouri, and therein occupy part of the railroad yards in that state. It is equally true that cabooses must be attached

in the State of Missouri to trains originating there, destined for Illinois and routed over the said bridges. This order not only interferes with interstate commerce, but directs what must be done in another state wherein the transportation movement destined for this state, begins. Another observation clearly shows the interstate character of this operation for while the caboose might be in one state, the locomotive drawing the same may very well be in the other.

The courts frequently have considered the power of a state to regulate railroad movements. In *Chicago, Rock Island & Pacific Railway Company* vs. *Arkansas*, 219 U. S., the right of the State of Arkansas to enact a Full Crew Law was challenged. As the law operated solely within the boundaries of the state, its constitutionality was upheld. On the other hand, in *A. T. & S. F. Ry.* vs. *La Prade*, 2 Fed. Sup. 285, an act of the State of Arizona limiting the number of cars in one train movement was held unconstitutional, because it placed an undue burden upon interstate commerce, in that such limitation directly interfered with such commerce. The court pointed out the effect of such limitation law upon an east-bound train, leaving a point in California, consisting of eighty to one hundred cars or more, being hauled to a division point west of the boundary of Arizona, and there broken up into shorter trains of seventy cars or less in order to comply with the Arizona Law, and again upon leaving the State of Arizona being re-formed into a train of eighty cars or more. In order to form such train of eighty cars or more at least two separate movements of an interstate train would be necessary in the State of Arizona.

The City of Covington, Kentucky, passed an ordinance limiting the number of passengers using street cars in said city. The validity of this ordinance came before the Supreme Court of the United States in *South Covington Railway Company* vs. *Covington*, 235 U. S. 537. The Company operated street cars from the city of Covington in the state of Kentucky into the city of Cincinnati in the state of Ohio. In so far as this ordinance attempted to regulate the movement of cars in interstate commerce, it was held inoperative. In so holding, the court in part used the following language: "We think the necessary effect of these regula-

tions is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railways in many instances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and the interstate business might be impeded by conflicting and varied regulations in this respect with which it might be impossible to comply. On one side of the river, one set of regulations might be enforced, and on the other side quite a different set, and both being practically a continuous movement."

If Illinois has the power to adopt rules and regulations affecting train movements from this state to Missouri, Missouri surely has like power to do the same, which may result as stated in the case last cited, that on the one side of the river there may be one set of regulations, and another set on the other side. In my opinion the order adopted, in so far as it relates to movements over the bridges mentioned, invades the field of federal regulation, and is an unconstitutional interference with interstate commerce. While the agencies of the state and nation should be alert in the exercise of their respective jurisdictions, neither should attempt to invade the exclusive field of the other. The legislature of our state recognized the foregoing principle, for Section 90 of the Public Utilities Act states the following: "Neither this Act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this Union, except when specifically so stated, and insofar as the same may be permitted under the provisions of the Constitution of the United States and Acts of Congress, and the decisions of the Supreme Court of the United States."

It may be urged that the foregoing legislative declaration merely states the law, still it must be considered as a direction to the agency created by the Act, to obey its terms.

I am in full accord with the aims and purposes of the order, but withhold concurrence with that part thereof which concerns movements over the bridges in question be-

cause I believe the same to be an attempted regulation of interstate commerce and beyond our jurisdiction so to do. The end sought is worthy and admirable and almost persuades the exercise of such authority, yet a proper regard for the respective jurisdictions of the state and nation requires the exercise of restraint. I concur in all of the other provisions set forth in the findings and order.

(Signed) ANDREW OLSON,
Commissioner.

APPENDIX "C".

OPINION OF THE SUPREME COURT OF THE STATE OF ILLINOIS.

Docket No. 26261—Agenda 8—November, 1941.

BROTHERHOOD OF RAILROAD TRAINMEN, et al., *Appellants,*

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, *Appellee.*

Mr. Justice Stone delivered the opinion of the court:

Appellants seek reversal of a judgment of the circuit court of St. Clair county setting aside an order of the Illinois Commerce Commission requiring appellee to furnish, throughout the year, and maintain, caboose cars or shelter cars to be attached to cuts of freight cars transported to and from its yards in Illinois. The cause arises by petition of appellant Brotherhood of Railroad Trainmen, an organization representing trainmen and switchmen employed by appellee, filed with the Illinois Commerce Commission requesting that an order be entered requiring appellee to furnish caboose or shelter cars for its switchmen while in the performance of their duties in the territory in and around East St. Louis, Illinois. The petition alleged that appellee has failed to provide such cars for switchmen in the abovementioned territory, and as a result thereof switchmen, in the performance of their duties on transfer trains are necessarily required either to ride on

the draw-bar, in between freight cars, or on the top, or on the side of freight cars where numerous reduced vertical and horizontal clearances prevail, thus endangering the life, health and safety of such switchmen and of other employees, and of the public within the State of Illinois. Appellee's answer denied the power, right or jurisdiction of the Illinois Commerce Commission to enter any order in regard to the subject matter of the complaint so far as any movements in interstate commerce are concerned, and alleged that it now provides all the facilities reasonably necessary for the health, safety and lives of said employees.

Appellee is a railroad corporation which performs terminal services in the railroad switching district of East St. Louis, Illinois, and St. Louis, Missouri. Switchmen in its employ are assigned to particular switching crews. These crews make and break up trains in the yards, make deliveries from connecting roads to appellee; make transfer runs from the various yards of appellee to and from industries; make up trains and couple cars together, see that the air-brakes are coupled and in order on the train and when the train leaves the yard for a destination the switchmen take their proper positions on the train, the rear man taking his position on the rear car of the train, where he is required to ride. His duties are to line all switches back into proper position after their use by the train, and in case of a reverse movement, to watch street and highway crossings to protect the public. On some of the transfer runs, side or overhead clearance is insufficient to permit riding on the side or top of the rear car, in which case the rear switchman is required to ride the rear coupler of the car. The length of the trains handled by a crew on a trip varies from one to a hundred cars. A caboose is a railroad car furnished for the housing of train crews and equipped for their safety; provides a place for the crew to carry necessary flagging equipment, raincoats, extra or excess clothing, necessary first aid equipment and lunches; also to do any necessary clerical work. During the winter months, the handholds, draw-bars and sill steps of cars are often covered with ice, making it difficult for switchmen to get to the top of a car or to prevent being

jerked or jarred off. No caboose or shelter cars are furnished to crews working out of certain of the involved yards, though they are furnished from October to May each year on other runs by appellee, and on still other runs are furnished the year round. Various of the runs are entirely within the confines of the State of Illinois, others originate in Illinois and terminate in the yards of appellee in Missouri by crossing the Eads or Merchant's bridge, or originate in Missouri and after passing over one of those bridges terminate in one of the yards of appellee in Illinois. Ninety-eight per cent of the merchandise transferred in the runs between appellee's yards is being transported in interstate commerce. About sixty-eight passenger trains cross the Eads bridge each day. During the early part of each week about the same number of freight trains cross the bridge and later in the week the freight trains exceed the passenger trains in number. Approximately the same number of trains cross the Merchant's bridge each day.

The Eads and Merchant's bridges span the Mississippi river between East St. Louis in Illinois and St. Louis in Missouri. Each bridge has thereon double track railroads connecting with appellee's yards. The Commerce Commission found that the boundary line between the State of Illinois and the State of Missouri intersects the Eads bridge at a point about 1000 feet west of the west curb of Front street in the city of East St. Louis, and the Merchant's bridge at a point about 775 feet west of the Illinois shore line when the river is at a stage of 2.4 feet.

The commission's order, so far as the principal questions here are concerned, consisted of two items or findings and orders. By finding No. 34 it found that it is reasonable to require appellee to furnish, maintain and operate caboose cars throughout the year on its various transfer, delivery and industrial runs in and out of its three yards: (1) Central District Yard, (2) Madison Yard, and (3) Wiggins No. 2 Yard, the order specifying the particular runs among those yards or to line roads, all of which are within Illinois; and its finding No. 35 was the same as finding No. 34 as to reasonableness of the requirement, and ordered that in so far as operated within the State of Illinois: (1) in all runs into or out of C. D. Yard via Eads bridge, (2) runs

via Merchant's Bridge moving in or out of (a) Madison Yard, and (b) Wiggins No. 2 Yard, appellee furnish, maintain and operate caboose cars on its transfer, delivery and industrial runs.

On appeal the circuit court found that the portion of the order of the commission requiring cabooses to be attached to runs moving between appellee's yards in Illinois and over the Eads and the Merchant's bridges, is an interference with interstate commerce and beyond the power of the Illinois Commerce Commission. The court therefore set aside and reversed the order of the commission. It did not consider the validity of finding No. 34 and that part of the order since its power of review was merely to confirm or set aside the order as a whole. This was the correct procedure. *Brotherhood of Railroad Trainmen v. Elgin, Joliet and Eastern Railway Co.*, 374 Ill. 60.

The principal question in the case concerns the validity of the order of the commission requiring cabooses for these runs over the bridge. Though the commission's order applies only to cuts of cars moving within the State, it is argued by appellee, and not disputed, that the only practical way in which the order can be carried out on runs across the river is to carry these cabooses across the bridge into appellee's yard on the opposite side of the river.

Appellants argue that notwithstanding the trains involved in order 35 are moving in interstate commerce, the attaching of cabooses thereto is not a direct burden on interstate commerce but affects it but indirectly or incidentally, and that the order lies within the inherent power of the State to enact reasonable regulations for the protection of the health, lives and safety of persons within its confines. It is urged that only when Congress has acted is the power of the States impaired, and then only to the extent that their regulations shall not be such as to be in conflict with or repugnant to the action so taken by Congress. Appellee insists that the order based upon finding No. 35 as to the bridge runs is an undue burden upon, and a regulation of, interstate commerce, in violation of the commerce clause of the Federal constitution, and takes appellee's property without due process of law.

It is settled by decisions of the Supreme Court of the United States that a State can do nothing which will directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic. (*Atlantic Coast Line Railroad Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230; *Austin v. Tennessee*, 179 id. 343, 45 L. ed. 224; *Illinois Central Railroad Co. v. Illinois*, 163 id. 142, 41 L. ed. 107.) It is equally well settled that State or local enactments, passed in the exercise of the police power of the State, in the interest of the public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce, are valid. *Minnesota rate cases, (Simpson v. Shepard,)* 230 U. S. 352, 57 L. ed. 1511, and the cases therein cited.

The question involved in this case is one of power of the Commerce Commission. The question whether a statute of the State or an order of the commission acting within the authority conferred upon it by the General Assembly of the State, imposes a direct burden upon interstate commerce, is one of which the Supreme Court of the United States is the final arbiter. There are, however, certain principles under which rights of the States in the premises are to be recognized. All powers inhering in the people of the States, which have not been expressly granted to the United States or prohibited to the States, remain with the people. The State, by reason of its inherent and reserved police power, may enact laws promoting the peace and good order of society, for the preservation of life and health, or conducive to the comfort, convenience and welfare of the people. Notwithstanding acts coming within this reserve police power operate on the movements of interstate commerce and persons engaged therein, such law is nevertheless valid unless its effect is to directly lay some burden or restriction on interstate commerce which would not otherwise exist. (*Hennington v. State of Georgia*, 163 U. S. 299, 41 L. ed. 166; *Minneapolis and St. Louis Railroad Co. v. Emmons*, 149 id. 364, 37 L. ed. 769; *People ex rel. Stead v. Chicago, Indianapolis, and Louisville Railway Co.*, 223 Ill. 581.) Though by the Federal constitution Congress is given exclusive power to regulate commerce, the States may, in the exercise of the police power, make reasonable rules in regard to the method of carrying on interstate

business within the State, such as to provide precautions that shall be used to avoid danger to those engaged in interstate commerce within the State, or to the public, or may designate facilities for the comfort of passengers and employees, safety of freight carried, and the like. The test of the validity of such enactments or orders is whether they are consistent with the general requirement that interstate commerce shall be free and unobstructed. If they are, they do not amount to a regulation of such commerce. *Houston and Texas Central Railroad Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772.

The fact that a railroad may be engaged in both interstate and intrastate commerce, does not prevent a State from adopting such regulations as it may deem proper to provide for the safety of the men engaged in carrying on intrastate commerce, if such regulations are not inconsistent with or repugnant to acts of Congress adopted for the regulation of railroads engaged in interstate commerce. (*Luken v. Lake Shore and Michigan Southern Railway Co.*, 248 Ill. 377; *People v. Chicago, Indianapolis and Louisville Railway Co., supra; Missouri Pacific Railway Co. v. Kansas*, 216 U. S 262, 54 L. ed. 472.) It not only lies within the power of the State, but it is its duty, to establish such regulations as are reasonable and necessary for the safety of those engaged in the business conducted within the State. The rule is settled that so long as Congress does not occupy the field of regulation to be considered in a given case, each State is empowered to make regulations within that field regarding the safety of persons engaged in interstate commerce that passes through the State. Such regulations do not purport to regulate interstate commerce, but to care for the safety of persons within its borders. *Chicago, Rock Island and Pacific Railway Co. v. Arkansas*, 219 U. S. 453, 55 L. ed. 290.

In the case before us the order of the Commerce Commission appealed from, affected two classes of freight movements. The first was dealt with in what is known as finding No. 34 of the order, and had to do with interyard movements of freight, wholly within the State, but which movements contained largely shipments destined for interstate commerce; and finding No. 35 of the order, having to do with

switching movements of cars across the Mississippi river into appellee's yards in Missouri. The order required the use of cabooses or shelter cars in so far as those movements take place within the State.

We do not doubt the power of the Commerce Commission, delegated to it by the General Assembly under the police power, to make reasonable regulations protecting the health, safety and welfare of those engaged in appellee's switching business, so long as such regulations do not constitute an attempt to regulate, or do not directly burden interstate commerce, or run counter to Federal regulations on the subject. Appellee says these orders are attempts to regulate interstate commerce and constitute a direct burden upon such commerce and so are void for want of jurisdiction in the commission to promulgate them. It is not claimed that the Congress has specifically legislated on the subject of its use of these cabooses though it is argued that Congress has preempted the field.

The evidence shows that without cabooses or shelter cars, switchmen are required to ride on the outside of the rear car of the cut of cars being moved, and that in many places in the yards and on the bridges, side or overhead clearances are insufficient to permit riding on the side or top of the cars, with the result that the switchman is required to ride upon the coupler, which is dangerous and becomes specially so during storm or winter periods. It is shown that the jarring or sudden stopping or starting of a cut of cars may cause the switchman to lose his hold and be thrown and to suffer injury. Protection against casualties of that sort is not only within the power but the duty of the State when the same is exercised in a manner not inconsistent with the Federal laws governing interstate commerce, where such have been enacted or where such regulations do not result in a direct burden on interstate commerce.

As we have seen, the circuit court did not pass upon the validity of finding No. 34 of the commission's order. However, both parties have briefed the question concerning the power of the commission to enter its order on that finding, and the reasonableness of that order, and as that question is involved in the validity of finding No. 35, pertaining to

transfers across the bridges, it becomes necessary to examine fundamental questions involved in both findings.

Whether either of these findings and orders of the commission are valid, depends in the main upon whether compliance with such orders lays a direct burden on interstate commerce. Where the effect of an intrastate transaction or regulation, as applied to interstate commerce, is merely indirect, the regulation producing such transaction remains within the domain of the State power. (*Schechter* v. *United States*, 295 U. S. 495, 79 L. ed. 1570.) As was said by the Supreme Court of the United States in *Carter* v. *Carter Coal Company*, 298 U. S. 238, 80 L. ed. 1160, quoting from the *Schechter case*, "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal government. • • • The distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system." It was in the *Carter case* pointed out that the word "direct" "implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And, the extent of the effect bears no logical relation to its character."

Counsel argue as to both findings No. 34 and No. 35 of the Commission's order that they are a burden on interstate commerce in that they require an additional amount of time to attach and detach these cabooses and are unreasonable in that they involve a very large additional expense to appellee, and so constitute an unwarrantable interference with interstate commerce. The evidence before the commission as to the amount of time consumed was in conflict, ranging from eleven minutes to forty minutes per movement, though appellant concedes that some time is required to add a caboose to these cuts of cars. It is argued that time required to comply with this order may, at times, involve

appellee in penalties for failure to comply with certain regulations governing the transportation of perishable goods and livestock. It does not appear, however, that such is a necessary result nor that such results cannot be avoided by arrangement of train schedules. We are of the opinion that the record in this case does not establish that time consumed in complying with this order is so great as to amount to a regulation of interstate commerce or a direct burden upon it. The order does not purport to do so but was obviously promulgated to protect the lives and health of citizens of this State engaged in appellee's business within the State.

As to finding No. 35, which involves cuts of cars taken across the river into Missouri, counsel for appellee earnestly argue that since there are no means of leaving a caboose at the State line, where it could be picked up on return, the only practical way in which compliance with the order of the commission may be had is to carry such caboose with the cut of cars into its yards in Missouri and attach it in Missouri, and bring it back over the bridges so as to comply with the order within the State. This, appellee contends, is, in practical effect, a regulation of the movements of the appellee's trains in the State of Missouri, which is beyond the power of this State or its commission.

Numerous cases of the Supreme Court of the United States have been cited, none of which is entirely analogous on the facts to the case before us. In *Missouri Pacific Railway Co. v. Kansas, supra*, the Kansas Supreme Court ordered peremptory mandamus to compel the railroad to obey an order of the State Board of Railroad Commissioners requiring passenger train service to be established and maintained between Madison, Kansas and the Missouri State line on what is known as the Madison branch of the Missouri Pacific Railway. It was objected there that there were no terminal facilities at the State line between Kansas and Missouri and that to comply with the order the railroad would be required either to construct such facilities at that point or to carry its trains on through to and beyond Monteith Junction in the State of Missouri, where the Madison branch of the road intersects with the Missouri Pacific. The court pointed out, however, that the order of the

Railroad Commission was to supply the passenger service to the State line, and the fact that the practical method of compliance was to run the train across into Missouri, neither rendered the order unreasonable nor a direct burden on interstate commerce. It was also pointed out that its charter provisions required that the railroad conduct passenger traffic along this branch so far as it lay within the State of Kansas.

We are unable to see that charter contract features distinguish that case from the one before us on the question of State power. A claim of duty resting upon a utility to render service whether it arise out of its charter contract, an act of the General Assembly, or an order of an agency created by the General Assembly, based upon the police power of the State, involves the same ultimate question whether the State's order, sought to be invoked, is an attempt to regulate interstate commerce or places a direct burden upon that commerce. In this case and in the *Missouri Pacific case*, the same tests are to be applied in determining that question. In that case it was pointed out that the fact that the railroad extended its train operations into another State did not destroy the power of Kansas over its domestic commerce or bring local matters under the sway of Federal concern. That case, it will be noted, did not involve the character of order here under consideration, which draws its validity, if it has such, from the power of the State to protect its citizens from danger of injury.

Atchison, Topeka and Santa Fe Railway Co. v. *LaPrade*, 2 Fed. Supp. 855, involved the train limit law of Arizona, which provided that no trains of more than 70 cars should be transported in the State. The act was by a three-judge court held to be an invasion of the interstate commerce clause of the Federal constitution. It was there pointed out that as trains from eighty to one hundred cars were required to be broken into trains of not more than seventy cars at the boundary of Arizona, and additional engines and crews provided during the trip across the State, to be again coupled into long trains after leaving the State, the Arizona act infringed upon a field which was exclusively under Federal control, and the absence of Federal regulation concerning them did not give power to the State to

make rules which so necessarily controlled the conduct of interstate commerce; that the subject of the length of trains engaged in interstate traffic is national in character, requiring uniformity of regulation, which regulation is placed entirely under the control of Congress. Counsel for appellee argue that the case before us is analogous to the *LaPrade case*. This distinction, however, is to be noted: in the Arizona case the State requirements necessarily conflicted with Federal control of interstate commerce. Length of trains is a matter of national railroading, and the Arizona law was a direct attempt to control interstate commerce. There was no claim that it attempted to do anything else. It was not passed, as in the case before us, in the exercise of the State's police power and duty to protect the lives and safety of those engaged in operating the interstate trains.

It was pointed out in *Missouri Pacific Railroad Co.* v. *Norwood*, 283 U. S. 249, 75 L. ed. 1010, that in the absence of a clearly expressed purpose so to do, Congress will not be held to have intended to prevent the exercise of the police power of the States. In *South Covington and Cincinnati Street Railway Co.* v. *Covington*, 235 U. S. 537, 59 L. ed. 350, it is pointed out that in numerous instances that court had sustained local enactments based on the exercise of police power in the interest of public health and safety notwithstanding such regulations might incidentally or indirectly affect interstate commerce. This is also pointed out in the *Minnesota rate cases*, where the subject is reviewed at length. *Simpson* v. *Shepard*, 230 U. S. 352, 57 L. ed. 1511.

Counsel for appellee cite the *Covington case* as analogous on the facts to the case before us. In that case a petition was filed by the railway company in the Kentucky State court to enjoin the city of Covington from enforcing an ordinance for the regulation and operation of the street-cars of the company. This ordinance contained numerous provisions. Among others, it required that no street-car be allowed to carry more than one-third greater number of passengers, over and above the number for which seats were provided; that the company run and operate cars in sufficient number to at all times reasonably accommodate the public, and that it maintain a temperature in its cars of at least 50 degrees Fahrenheit. Many of the cars of the

company operated across the Ohio river over a bridge and into the city of Cincinnati, Ohio. Its traffic as to them was therefore interstate in character. The first two of the three provisions of the ordinance just referred to were held to be invalid on the ground that the necessary effect of such regulations was not only to determine the manner of carrying passengers in Covington and the number of cars to be used in so doing, but necessarily directed the number of cars to be run in Cincinnati and the manner of loading them there, where traffic was much more impeded and where the franchise privileges of the railway would not accommodate such increased number of cars. It was observed that if Covington could regulate these matters, Cincinnati could likewise, and interstate business might be impeded by the varying regulations. The provision of the ordinance regulating temperature to be maintained was held unreasonable and as practically impossible of performance. Other provisions of the ordinance were that the street-car company permit no one to ride on the rear platform unless the same is provided with suitable rail or barrier, and that no passengers be permitted to ride on the front platform unless a rail or barrier be provided separating them from the motorman, and that the company at all times keep its cars thoroughly clean and ventilated. These provisions were sustained as coming within the inherent police power of the State of Kentucky and it was held that it was competent for the State to provide for the safety and welfare of the people notwithstanding such regulations might indirectly affect interstate commerce.

Appellee's counsel argue that the *Covington case* is direct authority for their claim that this order of the Commerce Commission is invalid. They point out that if cabooses are required on these interstate switching runs, appellee will necessarily have to transport them for some distance in Missouri, and Missour could enact conflicting regulations. It will be noted that the factual situation in the *Covington case* was different, and was of much more difficulty. The franchise privileges of the street railway company in Cincinnati would not permit of compliance with the Covington ordinance and traffic conditions were much different. In

the case before us appellee owns the switch yards on both sides of the river, into which the switching movements are taken. The additional burden in operation would thus principally be to provide places for and to attach these cabooses.

Does the fact, if such be a fact, that the practical method of complying with the order would be to haul these cabooses into Missouri, of itself render the order of the commission invalid as a direct burden upon interstate commerce? In *New York, New Haven and Hartford Railroad Co.* v. *New York*, 165 U. S. 628, 41 L. ed. 853, the court was considering a New York statute regulating the heating of steam-passenger cars, and directing that guards and guard posts be placed on railroad bridges and trestles of approaches thereto. It was contended that the statute was repugnant to the constitutional provision that Congress shall have power to regulate commerce among the several states, and also repugnant to the fourteenth amendment of the constitution requiring that no State shall deprive anyone of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. It was held that while laws of the State must yield to acts of Congress passed in execution of the powers conferred by the constitution, the mere grant to Congress of power to regulate commerce among the several states did not of itself and without legislation by Congress, impair the authority of states to establish such reasonable regulations as were appropriate for the protection of the health, lives and safety of its people. It was argued there, as here, that a conflict between State regulations in respect of heating passenger cars used in interstate commerce, would make safe and rapid transportation impossible, since the different States through which the trains were to travel might put into effect conflicting laws that would be a hardship upon travel. As to that objection the court replied: "These possible inconveniences cannot affect the question of power in each State to make such reasonable regulation for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character cannot be avoided so long as each State has plenary authority within its territorial limits to provide

for the safety of the public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the States covering the same ground." It was in that case, as here, also contended that the statute was void in that it deprived the railroad company of its property without due process of law. This contention, however, was not sustained.

In *Atlantic Coast Line Railroad Co.* v. *Georgia*, 234 U. S. 280, 58 L. ed. 1312, a statute of the State of Georgia required railroads to equip their locomotives, hauling interstate trains, with electric headlights. It was contended there, as here, that if Georgia could prescribe electric headlights, other States through which the road ran might require lights of a different sort, and the result of various adjustments would be to delay interstate traffic. The court in that case held that although applicable to interstate traffic, the act was not directed against interstate commerce but indirectly affected it, and that the State is not to be denied, because of such indirect effect, the power to protect life and property within its limits. To like effect is *Chicago, Rock Island and Pacific Railway Co.* v. *Arkansas, supra*.

While none of the cases cited or herein discussed are entirely analogous on the facts, we think those cases which consider State exercise of police power for the safety of citizens of the State, bear a stronger analogy to the case before us on the facts, than do those in which the laws or orders bore a closer identity with regulation of interstate traffic as such. It does not appear that this order was directed against interstate commerce, nor does it deny equal protection of the laws. On its face, it must be taken as not so directed, but as the exercise of the power and duty inherent in the State to protect its citizens. It purports on its face to apply to train movements within the State, and the fact that it does affect interstate shipments or cuts of cars crossing from this State into the State of Missouri, results, in our opinion, under the facts of this case, in an incidental effect only upon interstate commerce.

Counsel for appellee say that the carrying out of this order would involve so large an expense as to affect its efficiency in the discharge of its duties as an interstate

carrier. The question of expenses of labor involved and the purchase of cabooses was one of sharp dispute in the testimony. We are of the opinion that those expenses, on this record, are to be classed with those inconveniences referred to in the cases herein cited as not affecting the power of the State to impose the regulation, unless so clearly unreasonable as to be beyond State power. This record does not so indicate.

Counsel for appellee also contend that the statutes governing the powers and duties of the Commerce Commission do not give jurisdiction to enter the orders here complained of. They cite section 90 of the Utilities act, (Ill. Rev. Stat. 1941, p. 2524,) which declares the act shall not apply to interstate commerce, except when specifically so stated and in so far as permitted by paramount Federal authority. It is not claimed, as we understand the argument, that the commission may not make orders in furtherance of the police powers of the State, but that it may not enter such orders as affect interstate commerce. As hereinbefore stated, the order complained of does not purport to regulate interstate traffic and its effect upon it is but incidental. As was pointed out in *New York, New Haven and Hartford Railroad Co.* v. *New York, supra,* and *Chicago, Rock Island and Pacific Railway Co.* v. *Arkansas, supra,* and other cases herein cited, inconveniences and incidental influence on interstate commerce do not mark the measure of the power of the State to protect its citizens. Appellee's contention cannot be sustained.

That there is substantial danger to switchmen that can be avoided by these cabooses or shelter cars, seems clear. We are of the opinion that the order of the Commerce Commission lay within the police power of the State; that such power has been delegated to that commission, to protect the lives, health and welfare of those engaged in the work of switching the cars on the runs carried out by the appellee, and that it was not beyond the power of the commission to enter finding No. 35 of its order requiring cabooses to the State line for those movements which crossed the bridges, and that such regulations do not directly burden interstate commerce.

The reasons and authorities cited in determining the validity of finding and order No. 35 must apply in the main to finding and order No. 34, which requires cabooses on interyard movements within the State. Much that has already been said in the consideration of this case applies to finding and order No. 34 and need not be repeated.

It is also argued that it was error to admit the testimony of one Thomas, an investigator for the commission. This contention is without merit. By section 60 of the Public Utilities act the commission is empowered to, on its own motion, conduct investigations. It follows that the commission may hear the results of such investigations.

We are of the opinion that the order of the commission as a whole was a valid exercise of the police power and that the circuit court erred in setting that order aside. The judgment of the circuit court is reversed and the cause is remanded to that court with directions to confirm the order of the Commerce Commission.

Reversed and remanded, with directions.

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No. 218

IN THE

SUPREME COURT OF THE UNITED STATES.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative, and ILLINOIS COMMERCE COMMISSION,

Appellees.

Appeal from the Supreme Court of the State of Illinois to the Supreme Court of the United States.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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Appeal from the Supreme Court of the State of Illinois to the Supreme Court of the United States.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS.

INTRODUCTION.

Appellees have filed with the Clerk of the Supreme Court of the State of Illinois, in accordance with the provisions of Rule 12 of this Court, their statement in opposition to the jurisdiction of this Court of this cause on direct appeal, and have included in said statement, as permitted by the rules, a motion that this Court either dismiss this appeal for want of a substantial federal question, or, in the alternative, that the judgment of the Supreme Court of

the State of Illinois be affirmed by this Court at this stage of the proceedings. This statement and motion was served on appellant on June 24, 1942.

Appellees concede that this Court has jurisdiction in this case on direct appeal from the Supreme Court of the State of Illinois. The only grounds assigned in opposition to jurisdiction and in support of their motion to dismiss or affirm, are that the alleged unsubstantial character of the grounds upon which appellant relies are so apparent as to warrant this Court in summarily disposing of the appeal at this stage of the proceeding upon a motion to dismiss or affirm, as provided by Rules 7 and 12 of this Court as amended.

Appellees' statement really constitutes a lengthy and complete brief on the merits of the case.

In filing our statement as to the jurisdiction of this Court on appeal we attempted fully to comply with both the letter and the spirit of paragraph 1 of Rule 12 of this Court as amended on April 6, 1942. We did not conceive that it was either necessary or proper in that statement to recite fully the evidence contained in the record or extensively to argue the legal points involved; but stated therein that upon an argument of the merits it was proposed to file a further and more extended statement as may be necessary for the consideration by this Court of this case on its merits, and also further decisions in support of our position. We conceived that the letter and spirit of Rule 12 only required us to quote such testimony and cite such cases as would clearly show that this Court had jurisdiction of this cause on direct appeal and that the federal questions presented were substantial. In that statement, in compliance with Rule 12, we showed the nature of the case, the rulings of the Court, bringing the case within the jurisdictional provisions relied upon, cited cases believed by us to sustain jurisdiction and also in-

cluded a statement of the grounds upon which we contend that the federal constitutional questions involved are substantial, together with citation of authorities in support thereof. In addition, as we read amended Rule 12, we covered all of the requirements of that rule when the appeal is from a state court. We even went further by citing authorities in support of our contentions as set forth in our petition for appeal, in our assignments of error and in our statement as to jurisdiction.

Appellees now seek on this motion to argue the case on its merits, both as to the law and the facts, with an extended statement of their version of the facts contained in the record, and the citation of many authorities said to support their position, together with copious quotations from many of these authorities.

As we have stated, appellees not only concede that under the statute this Court has jurisdiction of this case on direct appeal, but, in addition thereto, they also concede that we have correctly stated the various procedural steps taken before the Illinois Commerce Commission and in the various Illinois courts; that our statements are correct representing the technical jurisdiction of this Court; that the various Illinois statutes involved have been correctly quoted, and the correct dates of the various orders and the taking of this appeal stated, and that we have fully shown the timely and adequate presentation of the various federal questions involved in the Illinois courts and their rulings thereon.

However, out of an abundance of caution, we shall as briefly as possible reply to the statement filed by appellees in support of their motion to dismiss. We ask that this reply be considered in connection with our original statement as to jurisdiction which was filed with our petition for appeal, and upon which the Chief Justice of the Illinois Supreme Court allowed this appeal on June 11, 1942.

APPELLANT'S STATEMENT IS CORRECT.

Under the heading "Corrections in Appellant's Statement" appellees attack our statement of facts as contained in our statement as to jurisdiction. We shall consider these alleged inaccuracies in our statement.

Appellees attack our statement as incorrect in stating that it is impossible to cut off or couple a caboose on the bridges in the middle of the river; in stating that as a practical proposition the necessary effect of the Commission's order is to require appellant to carry its cabooses across the river into Missouri on westbound cuts and to put cabooses on its trains in Missouri on eastbound cuts in order to comply with the Commission's order; and in stating that the Supreme Court of Illinois had found the facts to be substantially as stated by us. It is stated by appellees that this statement is incorrect, insufficient, inadequate and rather misleading.

We respectfully refer to the record in support of our original statement. It will be remembered, as we have shown in our statement, that there are only two main tracks on each of the bridges; that it is impossible to cut a caboose in the middle of the river on the bridges and leave it standing on either of the bridges; that there is no place to do this because it would tie up the main tracks (Tr. 2—106). It is impossible to double to a caboose in crossing the river for the reasons explained by witness Davis (Tr. 2—108). At the Eads Bridge a tunnel begins about 500 feet from the west end of the bridge and only the two main tracks run in the tunnel, the same as they do on the bridge. The vast number of train movements on these bridges are described in our statement. These aggregate about 176 trains on each bridge each day (Tr. 2—106) or an average of a train every eight minutes on each bridge. As appellant's witness Davis said (Tr. 2—106-107), "It would not be possible to cut a caboose in

the middle of the river. We have no place to do it. Two trains would tie up the main tracks. The only practical way of doing that would be to start in Missouri on a movement to Illinois at our yard and bring the caboose the whole way, or from Illinois to Missouri to take it to Missouri. The same situation would apply to the Merchants Bridge."

Furthermore, R. B. Thomas, Chief Railroad Inspector for the Commission, who testified as a so-called Commission witness, corroborated the testimony of appellant's witnesses upon these points. Thomas stated (Tr. 2, 138), "All these runs over these two bridges either come from the State of Missouri to Illinois or go from the State of Illinois to the State of Missouri." Thomas further stated (Tr. 2, 139), "As a practical proposition, to put cabooses on those runs across the river would require them to be hauled on over to St. Louis on runs from Illinois and put on the train on the runs in Missouri to bring them into Illinois, from the observation I made on the bridge, as I did not see any places cabooses could be set out in Illinois. If a caboose was taken to the middle of the river on either of these bridges, either westbound or eastbound, as a practical railroading proposition it would be necessary to take them on to the other side of the river."

Furthermore, the Illinois Supreme Court in its opinion (Tr. 9) said: "Though the Commission's order applies only to cuts of cars moving within the State, it is argued by appellee, and not disputed, that the only practical way in which the order can be carried out on runs across the river is to carry these cabooses across the bridge into appellee's yard on the opposite side of the river."

Furthermore, the Supreme Court of Illinois in its opinion (Tr. 14) said: "As to finding No. 35, which involves cuts of cars taken across the river into Missouri, counsel for appellee earnestly argue that, since there are no means of leaving a caboose at the State line, where it could be

picked up on return, the only practical way in which compliance with the order of the Commission may be had is to carry such caboose with the cut of cars into its yards in Missouri and attach it in Missouri, and bring it back over the bridges so as to comply with the order within the State. This, appellee contends, is, in practical effect, a regulation of the movements of the appellee's trains in the State of Missouri, which is beyond the power of this State or its Commission."

Furthermore (Tr. 17), the Supreme Court of Illinois in its opinion, in referring to our contentions, said: "They point out that if cabooses are required on these interstate switching runs, appellee will necessarily have to transport them for some distance in Missouri, and Missouri could enact conflicting regulations."

Furthermore, in its opinion (Tr. 17), the Supreme Court of Illinois said: "Does the fact, if such be a fact, that the only practical method of complying with the order would be to haul these cabooses into Missouri of itself render the order of the Commission invalid as a direct burden upon interstate commerce?"

The Supreme Court of Illinois then (Tr. 17-18) rejected our contentions based upon these facts upon the ground that the effect of the order was not a direct burden on interstate commerce, but merely an inconvenience occasioned by the exercise of its police power by the state, and upon the ground that the order on its face was not directed against interstate commerce, but on its face must be taken as not so directed, and that because the order purported on its face only to apply to train movements within the state, the fact that it does affect interstate shipments or cuts of cars between the two states occasioned only an indirect effect upon interstate commerce.

In their statement, appellees seek to point out that the evidence shows crossovers on the two bridges, and cite the record (Tr. 2, 141 and Tr. 2, 28) in support of this

contention. A reference to the testimony of Thomas (cited Tr. 2, 141) shows that all he testified was "There are no crossovers that I observed from one track to another on the Merchants Bridge in Illinois. There are perhaps two crossovers on the approach to Eads Bridge in Illinois." The testimony of witness Jenkins (Tr. 2, 28-29) is referred to. His testimony shows that there is a crossover on the Merchants Bridge about 700 feet from the water line in Illinois so that trains could be transferred from one track to another when necessary, and that there is a crossover on the Eads Bridge, but he was not certain as to whether it would be in the State of Illinois or not, although he thought it would be; and he testified that it would be possible to put crossovers on these bridges in the State of Illinois.

Assuming all of these facts to be true, the undisputed evidence shows that with the hundreds of trains running each day over these bridges, and with only two main tracks, it would be impossible to cut a caboose from one main track to another main track and leave it on the other main track, even though crossovers existed. Such practice in itself would directly hinder, obstruct and impede interstate traffic.

We submit, therefore, that our original statement was correct and that the only practical way to comply with the order was as we have above stated, which necessarily required compliance with the order between the state line and a yard in the State of Missouri, where the Commission had no power, jurisdiction or authority to act.

Counsel for appellees also contest our statement that the furnishing of cabooses has always been considered a working condition and has been dealt with as such by appellant and its switchmen, and that caboose cars have always been and are being furnished on certain runs by reason of written contracts between the Brotherhoods and appel-

lant. It is said that this is an inaccurate statement and that the record in no wise sustains our statement that the furnishing of cabooses has been, and is, considered a working condition.

As to what runs cabooses were furnished by agreement with the Brotherhoods and as to the contract between the parties, the record is clear (Tr. 2—111-112-115). The record shows (Tr. 2—113) as to how the use of cabooses has been regulated from 1910, when three cabooses were furnished by agreement, until the time of the trial, when thirty-one cabooses were in use. In each instance these agreements were made with the men through their representatives, and the current agreement as to cabooses is shown in full (Tr. 2—114-115) as a result of an agreement between appellant and the officers of the Brotherhood.

Furthermore, it is said that the evidence as to delays by furnishing cabooses is largely hearsay, and a quotation is cited from the testimony of one of appellant's witnesses (Tr. 2—198) to the effect that his knowledge of delays in the Pennsylvania yards was based on hearsay. This witness was the superintendent of appellant, having full knowledge of its switching operations, and while it is true that as to the delays in the Pennsylvania yards his knowledge was gained by hearsay, his testimony as to delays on all other runs was from actual knowledge and observation.

Furthermore, appellant produced its three general yardmasters in Illinois, L. E. Knight (Tr. 2—188), R. D. Parish (Tr. 2—183) and Walter H. Rolen (Tr. 2—172), all of whom corroborated the superintendent's testimony as to the average delay occasioned by the furnishing of cabooses. In addition, F. M. Heinlein, yardmaster for the Pennsylvania Railroad, testified (Tr. 2—163) as to the delays in the Pennsylvania yards, and as to appellant's runs to and from this particular Pennsylvania yard. He

testified (Tr. 2—167) that there would be an average delay of between fifty minutes and one hour on a forty-car train from the appellant, taking a cut back to the appellant, with a caboose, over what there would be without one, and that the maximum or top figure of delay would exceed one hour, not including any delay in appellant's CD yards.

It is further said that Davis' testimony of an average of forty minutes delay and $10.00 cost per run was likewise without factual basis in the record, and that his estimate of the $400,000.00 outlay for the first year was of the same incompetent character. This is not true. The witness (Tr. 2—114) testified that the initial cost would be $150,000.00 to purchase the necessary cabooses, and that the annual cost by reason of delays in switching occasioned by the use of cabooses would be $250,000.00, and that he based this statement on the number of runs involved at an average of $10.00 per run, or at an aggregate value of $100.00 for each eight hours an engine and crew were used.

Thomas, the Commission's witness, testified that he would not be surprised to learn that at the present time, with increased wages, etc., the value of a switch engine was figured at $100.00 for a day of eight hours (Tr. 4—19); and he testified that in the '20s, when he worked for the Illinois Central, the charge was $75.00 for an eight-hour day (Tr. 4—19 and Tr. 2—124). However, this is more or less immaterial now, because the Supreme Court of Illinois found that the evidence showed that the delay occasioned was from eleven minutes to forty minutes per movement, and that appellees conceded that some time is required to add a caboose to these cuts of cars.

Appellant's Exhibit 36 (Tr. 4, 36-37) shows a large number of these movements on a typical day, and fully substantiates appellant's contention as to the cost.

Furthermore, it is said that our statement that the Commission's testimony showed that the initial cost of new cabooses would be $44,000.00 and the extra annual expense in wages about $62,000.00 is inaccurate, although it is admitted that the initial cost of shelter cabs was estimated. However, the testimony clearly shows that Thomas was estimating the cost of shelter cabs, while the order requires caboose cars, and that he did not consider a sufficient number of cabooses to handle the business of appellant. The evidence shows that fifty additional cabooses would be needed (Tr. 2-157), in addition to the thirty-one cabooses now in use (Tr. 2-113).

As to the annual cost, it is true that Thomas, in explaining his report (Tr. 2-140), referred to a figure of $27,777.22 as the extra wages involved by reason of handling cabooses. This was based on actual time as shown by his "show" tests, but his report shows, when the various items are added up, that the maximum delays would result in an outlay of about $62,000.00 per year in wages alone (Tr. 2, 210-231, 250-266). This covered only wages (Tr. 2, 250-266), and it will be noted (Tr. 2, 250) that Thomas stated in his report as follows: "It is estimated that the total annual railway operating expenses for cabooses will be approximately two and a quarter times the estimated annual crew wages for handling cabooses." It is submitted that when the $27,777.22 figure, covering only wages, is multiplied by two and a quarter, as testified by witness Thomas, the annual extra cost is $62,000.00. This is based upon his actual tests, and if his maximum delay is considered, the total cost would approximate our testimony of an outlay of $150,000.00 annually.

It is said that we misquoted the opinion of the Supreme Court of Illinois to the effect that the evidence before the Commission showed that the delays per run ranged from 11 minutes to 40 minutes per movement. An examination of that part of the opinion quoted in the statement shows

that that is exactly what the Supreme Court of Illinois did say.

It is immaterial here whether the delay on each run was eleven minutes, forty minutes or some intermediate figure. It is likewise immaterial whether the original cost of new cabooses was $44,000.00 or $250,000.00, or some intermediate figure. It is likewise immaterial whether the added annual expense would be $62,000.00 or $250,000.00. In any event, the delays and costs would be sufficient to support our contentions that substantial federal questions are presented for determination by the Court.

Furthermore, the tests made by Thomas were made under ideal conditions. Everything was set for the tests, advance information having been given to everyone concerned in the yard force (Tr. 2, 156). It was a "show run" and was given preference over everything, where regularly they would have to take the cars, get the caboose when they could and get out when they could (Tr. 2, 156). The evidence further showed that in actual practice the delays with a caboose would be many times greater than shown by the test runs (Tr. 2, 156-157). Fifty new cabooses would be necessary to comply with the order (Tr. 2, 157). Thomas' figures referred only to shelter cars and not to caboose cars, which are required by the order. The testimony of the witness Davis as to the delays is found in the transcript (Tr. 2, 114, 155-161).

In regard to the statement as to the use made of a caboose when attached to these switching runs, attention is called to the undisputed testimony of witness Davis (Tr. 4, 23) to the effect that the cabooses would only be available for use of the rear switchman, who would only ride it when it was moving between one yard and another, and the testimony to the same effect (Tr. 2, 155). The statement that this one rear switchman would only use a caboose for one-sixth to one-eighth of his working time is based upon the exhibits (Tr. 4, 27-28-29-30-31-32) show-

ing the time between yards and the number of movements, which conclusively show that in a rear switchman's eight-hour period he would only use the caboose the time stated.

Answer to Appellees' Addition to Statement.

Appellees also have in their statement and motion a division under the heading of "Additions to Appellant's Statement." We do not think on this motion to dismiss that we are required fully to answer this, because the material facts necessary for the determination of the federal questions involved are set forth in our statement as to jurisdiction of this Court on appeal and in what we have heretofore said in this brief. These matters may, and probably will, become material on the consideration of the merits of this appeal, but not on this preliminary question as to the jurisdiction of this Court on appeal, and as to whether or not substantial federal constitutional questions are involved.

Since our original statement was filed, showing the opinion of the Supreme Court as reported in 379 Ill. 403, the opinion has been printed in the Northeastern Reporter, its citation being 41 N. E. (2d) 481.

However, some of the alleged facts contained in the additional statement require either amplification, modification or explanation. Of course, the dangers incident to lack of cabooses are greatly exaggerated in appellees' statement. The undisputed testimony shows that an engine crew consists of five men. The engineer, fireman, foreman and head brakeman all ride on the engine and only the rear brakeman would have any use of the caboose (Tr. 4, 23; Tr. 2, 155), and he would only be able to use it a very small part of the time—probably from one-eighth to one-sixth of the time he worked, because he would not use it when making switches in the yard, making up

trains, breaking up trains, when flagging street crossings and when going through interlockers and when doing switching. The rear switchman could only use a caboose between yards. For example (Tr. 2, 196), on the run to the Pennsylvania, the rear switchman would spend only eleven minutes in the caboose and the rest of the time he would not be able to use the caboose. The running time between yards (Tr. 2, 27) is from fifteen to thirty minutes, with one exception, and on that run cabooses are furnished.

The distance between yards varies as to the 20 so-called Illinois runs from 6,800 feet to 41,000 feet; four of these are less than 10,000 feet apart; 10 are from 10,000 to 20,000 feet apart, and six are over 20,000 feet apart. On some of these longer runs cabooses are furnished the entire year, and on some of them from October 15 to May 15 (Tr. 4, 30). A rear switchman (Tr. 4, 19; Tr. 2, 162) only uses a lantern by night and a flag by day; he has no other equipment and consequently needs no place to store it. The men quit at the same place where they report (Tr. 2, 154). There are sixteen service stations in the three yards in Illinois at various places, giving ample facilities for storage of street clothes, lunches, etc. (Tr. 4, 38-39), and there is also a seatbox in the engine for that purpose (Tr. 2, 155).

Appellant has been losing money for years, the net loss for the seven years before the hearing being over $1,300,000, or an average yearly loss for the seven years of nearly $200,000 (Tr. 4, 33-34). For the first six months of 1938, while the hearing was in progress (Tr. 4, 33), a loss of over $1,000,000 was sustained, and in July, 1938, when the case was being tried, appellant suffered a loss of over $112,000. The same figures were shown by the income tax reports (Tr. 4, 33).

In one typical day of 24 hours, there were 29 movements from Cabin No. 1 in CD Yard; 25 movements to and from the St. Louis district; 50 movements through Bridge

Junction; six movements over the Merchants Bridge; 39 movements in and out of Madison Yard; 21 movements of west side crews into and out of Madison Yard; 71 movements into and out of Wiggins Yards 2 and 5; eight movements from CD Yard to the Pennsylvania; nine to the Alton; 11 to the Wabash, and 10 to the Big Four (Tr. 4, 36-37).

From 1928 to 1936 (Tr. 4, 32) there were eight injuries to employes in cabooses, one on the rear end and seven while riding on cars, showing that in nine years, out of 16 accidents, eight happened to men riding in cabooses, seven while riding on cars and only one while riding on the rear end.

Very few of the lines around St. Louis use cabooses in deliveries to appellant (Tr. 2, 96). On one of the runs shown by Thomas' testimony, where the test showed a delay of two minutes for the caboose, if there had not been advance notice given and everybody lined up to do a specific move, if it was a regular and ordinary move, it would take from 30 to 40 minutes to get the caboose and put it on the train, get the caboose on the return trip from the I. C., bring it back to the CD Yard and put it away (Tr. 2, 155). To the same effect is the testimony Transcrip; 2, 191. The delays would average 40 minutes on every delivery made with a caboose out of all of the yards involved (Tr. 2, 161).

These figures are for a period three or four years ago. With the increased business and necessity of expeditious movement caused by war conditions, the delays and consequent expense to appellant to comply with this order would be vastly more than shown by the record.

The fact that some other railroads in the territory furnish cabooses has no bearing on the questions involved on this appeal.

As to the runs involved in finding 35 (the bridge runs), the questions of delay, expense and extraterritorial effect

are involved; while as to the runs involved in finding 34 (the interyard runs), the questions of delays and expense only are involved.

The Federal Constitutional Questions Involved on This Appeal Are Substantial in Character.

We think that we have covered this point in our statement as to jurisdiction sufficiently for the purposes of considering appellees' motion. However, out of an abundance of caution, we deem it advisable and necessary briefly to answer appellees' argument on this point. We do, however, ask to have our statement as to jurisdiction and the points and authorities contained therein also considered in connection with this part of our brief.

We conceive the law to be as stated in our statement as to jurisdiction, that if Congress has not legislated in the field the state may pass and enforce proper police regulations which only indirectly and incidentally affect interstate commerce. However, if Congress has taken possession of the field, even though not of the particular subject involved, then the state cannot regulate, whether the effect on interstate commerce be direct or indirect. We conceive it further to be the law, as shown in our statement as to jurisdiction, that the state cannot legislate, even though it purports only to legislate within its own limits, where as a practical proposition its order must necessarily be enforced and carried out in another state where the state legislating has no power, jurisdiction or authority. The state legislation is invalid when its necessary practical effect is extraterritorial. In other words, we contend, and have cited numerous authorities in our statement to that effect, that if Congress has taken possession of the field the state cannot legislate at all, whether its effect on interstate commerce is direct or indirect; but that if Congress has not taken possession of the field, then the state may

legislate by the enactment of proper police regulation, provided the enforcement thereof does not directly affect and burden interstate commerce. We also make contentions connected with the violation of the Fourteenth Amendment in depriving appellant of its property without due process of law, which we shall take up later in this brief.

Appellees in their statement concede the law to be as above set forth. They concede that if Congress has not taken possession of the field and the effect on interstate commerce is only indirect or incidental, then the state may pass and enforce proper police regulations, but that it cannot do so if the enforcement of these regulations directly affects or burdens interstate commerce. Appellees contend that the United States has not legislated in the field, that the effect on interstate commerce is only indirect or incidental and not direct; that the order does not require extraterritorial enforcement and that it does not deprive appellant of its property without due process of law.

The Order Does Directly Burden and Affect Interstate Commerce and Does Have an Extraterritorial Effect.

We showed, by citation of authorities in our original statement, that even if the state legislation on its face purports to be limited to the confines of the state, and does not on its face purport to regulate interstate commerce, yet in determining its constitutionality it must be considered from the standpoint of what it actually results in rather than from the standpoint of what it purports to do. The Supreme Court of Illinois held otherwise.

Counsel cite the case of C. R. I. & P. R. R. v. Arkansas, 219 U. S. 453, where this Court sustained the constitutionality of the Arkansas Full Crew Law. Commissioner Olson (Tr. 2—19) in his dissenting opinion conclusively answered the argument of appellees relative to the effect of

that case. The law was held constitutional because it operated solely within the boundaries of Arkansas and could be enforced in that state without necessarily being enforced in another state. This Court did not hold that, where as a practical proposition an order or statute, in order to be enforced in Illinois required it also to be followed in another State, then the statute or order would be constitutional. The other cases cited in our statement as to jurisdiction clearly answer this argument of appellees and sustain our contention and the position of Commissioner Olson that inasmuch as this order as to the bridge runs cannot be enforced in Illinois without necessarily applying to operations in Missouri, it cannot be sustained. It is obvious in the Arkansas case that when the state line was reached the extra member of the crew could cease work, and that no full crew legislation could require the extra member of the crew to be used in another state where no applicable legislation to that effect existed.

Atlantic Coast Line R. Co. v. Ga., 234 U. S. 290, is also cited, and copiously quoted from. The statute involved in that case required engines in Georgia to be equipped with electric headlights. The headlights could be operated in the state. It was a statute that could be enforced solely in Georgia without necessarily being applicable in other states, and consequently this Court held it constitutional. Both this case and the Arkansas Full Crew case (decided in 1911 and 1913 prior to extension of the Interstate Commerce Act and other federal legislation) were decided before the decision of this Court in South Covington & Cincinnati Street Ry. Co. v. Covington, 235 U. S. 537, which latter case is on all fours with our case. If the Atlantic Coast Line case conflicts with the decision in the Covington case, supra, the latter case is not only later, but is based upon a state of facts very similar to the facts in the case at bar; in fact, this Court in the Covington case,

supra, quoted the Atlantic Coast Line case, supra, as authority for its holding that the provisions of the Covington ordinance held constitutional only incidentally regulated interstate commerce.

The same answer can be made to the case of Whitney v. Johnson, 37 F. Supp. 65, affirmed by this Court in a per curiam opinion in 314 U. S. 574.

Appellees also cite and quote from the recent case of California v. Thompson, 313 U. S. 109. This case involved the constitutionality of a California statute requiring every transportation agent for motor vehicles over the state highways to procure a license from the State Railroad Commission, pay a license fee and file a bond. These transportation agents negotiated for the sale of transportation over the public highways of the state. All that this Court held in that case was that, in the absence of pertinent regulation by Congress, the statute requiring a transportation agent to procure a license, pay a fee and file a bond does not violate the commerce clause when applied to one who negotiates for transportation interstate of passengers over state highways where the license is not conditioned on any control or restriction of movements of traffic interstate, but is conditioned only on the good character and responsibility of those engaged locally as transportation brokers. The Court sustained the legislation on the ground that (a) it was not a revenue measure, (b) it did not operate to increase the cost of transportation and (c) its purpose was only to prevent fraud on the public.

There is nothing in the case of Duckworth v. Arkansas, 314 U. S. 390, to militate against our contention here. It, in fact, sustains the power of the state in the regulation of the liquor traffic under the Twenty-first Amendment. We call particular attention to the concurring opinion of Mr. Justice Jackson as pertinent to the facts in this case.

Counsel discuss the Covington case, supra, 235 U. S. 537, and seek to show from it that that case supports their contention instead of ours. In that case the City of Covington, Kentucky, passed an ordinance which provided, among other things, that passengers could not ride on the rear platform of street cars, except under certain conditions, nor upon the front platform of street cars unless certain conditions were complied with, and requiring the street car company to keep the cars clean, ventilated and fumigated. The ordinance also had provisions relative to the number of passengers to be carried on a car and the number of cars to be provided, and certain requirements as to the heating of the street cars. The railway company operated a street car line from Covington, Kentucky, across the Ohio River to Cincinnati, Ohio. This Court sustained the provisions relative to passengers riding on the rear and front platforms unless suitable barriers or rails were provided and the requirement to keep the cars clean, ventilated and fumigated, because those provisions of the ordinance could be complied with in Covington without necessarily being complied with in Cincinnati. This Court, however, held invalid that part of the ordinance relative to the number of passengers to be carried on a car and the number of cars to be provided, because such provisions of the ordinance were a burden upon interstate commerce for the reason that, inasmuch as the cars went across the river to Cincinnati, the City of Covington was endeavoring to make regulations which, if enforced in Covington, as a practical proposition, would necessarily have to be carried out in Cincinnati, a place where the City of Covington had no jurisdiction. This Court did not base its decision upon the question of whether or not federal laws had superseded state laws, but upon the fact that Covington, Kentucky, could not pass an ordinance as to the number of cars to be run across the bridge on the line of the street railway com-

pany, or as to the number of passengers to be carried on each car, where such regulation would, as a practical proposition, require the same number and kind of cars to be run or the same maximum number of passengers to be carried on each car, in another state, where the City of Covington had no jurisdiction. On page 545 of the opinion the Court said:

> "This court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between states, the mere arrangements of billing or plurality of carriers do not enter into the conclusion. Here is an uninterrupted transportation of passengers between states, on the same cars, and under practically the same management, and for a single fare. We have no doubt that this course of business constitutes interstate commerce. Texas & New Orleans R. R. v. Sabine Tram Co., 227 U. S. 111; St. Louis, S. F. & T. R. R. v. Seale, 229 U. S. 156; Railroad Commission of Ohio v. Worthington, 225 U. S. 101; Omaha & Council Bluffs Street Ry. v Interstate Commerce Commission, 230 U. S. 324, 336. A contrary conclusion was reached in this case by the Kentucky Court of Appeals upon the authority of Missouri Pacific R. R. v. Kansas, 216 U. S. 262, but that case concerns an order under authority of the State of Kansas, requiring the running of a passenger train wholly within the state. It was pointed out in the course of the opinion that the order did not deal with an interstate train or put a burden upon such train, but simply required the operation within the state of a local train, the duty of operating such train arising from the charter obligation of the company."

After holding as above stated, this Court then divided the ordinance into two parts, as above mentioned, and held valid that part that could be enforced wholly in Covington, without necessarily being enforced in Cincinnati,

but held invalid that part as to the number and kind of cars and the number of passengers to be carried which could not be enforced in Covington without also being enforced in Cincinnati. On pages 547 and 548 of the opinion the Court said:

> "We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply."

Furthermore, the Court held that the ordinance requirement as to minimum temperature to be maintained was unreasonable and void for the reason that the evidence showed it to be impossible and impractical in actual operation.

This makes the Covington case an absolute authority in the present case. The undisputed evidence in the present case shows that if cabooses are required on these interstate bridge runs in Illinois, the appellee will necessarily have to have cabooses for great distances in Missouri. In other words, cabooses cannot be furnished to the state line and then taken off, but as a practical proposition, which this Court said was the test in such matters, the full effect of finding 35 is to require cabooses to be put on in the yards in Missouri and carried a considerable distance in Missouri in order to be on the trains when entering Illinois at the state line; and it further re-

quires cabooses to be carried in Missouri after the state line is passed for a considerable distance to the yard in Missouri before they can be detached from the train. These facts are undisputed and are shown conclusively not only by appellee's witnesses, but also by the testimony of Mr. Thomas, the chief inspector of the Commission, who was called as a Commission witness.

We respectfully submit that the Covington case absolutely disposes of this case and it was on the authority of this case and other cases that Commissioner Olson dissented from the order and decision of the Commission.

In its opinion (Tr. 10) the Supreme Court of Illinois seemed to think that this Court held certain portions of the ordinance invalid because of certain franchise provisions of the Street Railway Company in Cincinnati. All that this Court held was (l. c. 547) that this was one of the facts to be considered, as appears from the following short quotation from the opinion:

> "To comply with these regulations, the testimony shows, would require about one-half more than the present number of cars operated by the Company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges, held by the Company, or controlled by it, in that City. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation of the cars of this Company, are to be taken into view in determining the nature of the regulation here attempted, and whether it so directly burdens interstate commerce as to be beyond the power of the State."

Counsel seek, however, to assert that the Covington case supports their theory, because they say this Court sustained the ordinance provision for barriers or rails on the

rear platform of the car. They misquote the ordinance, as shown by their own quotation from the opinion of this Court. The ordinance provided that no passenger could ride on the rear platform unless it was provided with a suitable rail or barrier. This Court sustained this provision of the ordinance. It did not require a rail or barrier, but only prohibited passengers on the rear platform unless rails or barriers were provided. This could be enforced in Covington and need not be enforced in Cincinnati. When there was no rail or barrier passengers could not ride on the rear platform in Covington, but they could do so when the state line was reached.

We respectfully, in view of the difference of opinion as to the proper construction of the Covington case, refer the Court to the opinion in that case, as a reading of it will bear out our contention in every way.

But counsel for appellees say that the requirement of furnishing a caboose for the protection of switchmen has no more direct effect upon interstate commerce than the requirement of the Arkansas Full Crew Law and the requirement of the Georgia Electric Headlight Law. It is obvious that this argument cannot be sustained. Neither the Arkansas nor the Georgia statute required any compliance in any other state. Each of these laws could be enforced in the respective states enacting them without necessarily being enforced as a practical proposition in any other state. The extra member of the crew could be relieved of work the moment the state line was reached as he was leaving the state and could be put to work only when the state line was reached in entering the state. The electric headlight could be used in Georgia and turned on or off, as the case might be, exactly on the state line without delaying or impeding through traffic. The practical operation of neither of these statutes required compliance in any other state. We respectfully call the Court's atten-

tion to the cases we have cited in our statement as to jurisdiction upon these points.

The same answer can be and is made to the New York electric headlight statute, held constitutional by this Court in N. Y. N. H. & H. R. Co. v. New York, 165 U. S. 628.

Counsel also cite the case of Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262. In that case the order of the State Commission directed the operation of a passenger train between Madison, Kansas, and the state line. This decision was not only before the decision of this Court in the Covington case, supra, but it merely sustained the right of Kansas to require the operation of an intrastate train within the State, where the duty to operate arose from a charter obligation, and, furthermore, the matter of operation beyond the state line was held to be merely a matter of election on the part of the railroad company and not to be required as a matter of practical operation of the railroad. The order dealt with a **local**, not interstate, train designed to make connections with other railroads within the state.

In distinguishing this case from the Covington this Court so held (p. 545).

We submit that on this question we have clearly shown that a substantial Federal question is raised by this appeal. In our brief on the merits we expect to cover the matter fully, but we do not deem it even proper upon this preliminary motion, where the only question raised is that the question is not substantial, to go to great length in arguing this matter. We might even rest our case on this question upon the opinion of the Supreme Court of Illinois, because that opinion shows that not only was a substantial Federal constitutional question raised in this respect, but also that the Supreme Court of Illinois passed upon it. The State Court considered the question substan-

tial, and it is a question of such substantial and important character and nature (and is now of particular importance because of the critical transportation situation induced by the war) that it ought to be determined by this Court when the question is properly raised here on direct appeal.

Congress Has Taken Possession of the Field, and Therefore the Order Is Invalid, Whether the Effect Upon Interstate Commerce Is Direct or Indirect.

Counsel further contend that no substantial Federal question is raised with respect to Congress having taken charge of the field. We have shown by our statement as to jurisdiction, and by the authorities therein cited, that where Congress has taken charge of the field, a State cannot legislate in that field even though the effect upon interstate commerce is indirect, and even though Congress has not legislated as to the particular matters involved. The whole question is whether Congress has taken possession of the field, and it is immaterial then whether it has legislated concerning the particular matter within the field.

In our statement we have pointed out that the furnishing of cabooses was a working condition that has always been determined by contract between appellant and its employes, and that under the amended Railway Labor Act of June 21, 1934, U. S. C. A., Vol. 45, Sup., beginning on page 235, it appears that Congress by that Act conferred upon the National Railroad Adjustment Board full jurisdiction for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions. We further showed that Congress has also taken jurisdiction of the field by the passage of the Car Service provision (paragraphs 10 to 17, incl., and paragraph 21 of Sec. 1 of the Interstate Commerce Act), 49 U. S. C. A., par. 1 (10-17, 21); by the Boiler Inspection Act, 45 U. S. C. A.,

Sec. 22 et seq.; the Power Brake provision of the Safety Appliance Act, 45 U. S. C. A., Sec. 1 et seq.; by Sec. 26 of the Interstate Commerce Act, 49 U. S. C. A. 26, and by Sec. 439 of the Transportation Act of 1920, as construed by the Supreme Court of the United States in Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456, 478. Sec. 439 of the Transportation Act was inserted in the Interstate Commerce Act as Sec. 20a (49 U. S. C. A., Sec. 20a), and subjects to the approval of the Interstate Commerce Commission all issues of securities or other evidences of indebtedness. The effect of this enactment was discussed by this Court in R. R. Com. v. Southern Pacific Ry. Co., 264 U. S. 331.

Appellees contend that this Court, by its decision in Mo. Pac. R. Co. v. Norwood, 283 U. S. 249, has foreclosed us from successfully maintaining the position that Congress has occupied the field by the passage of the National Railway Labor Act. This case was another case involving the Arkansas Full Crew Law. All that this Court held in that case was that the fact that the Railway Labor Act authorized regulation in respect to the practice of the carrier in supplying trains to be provided by the carrier did not include the regulation of the number of brakemen or helpers. The decision construed only that language and does not in any way assert that Congress has not given full jurisdiction to the National Railway Labor Board to settle disputes as to working conditions. In fact, it supports our contention, because it holds that Congress has taken jurisdiction in regard to supplying trains. All that it does hold is that, by taking jurisdiction of that matter and placing it in the Labor Board, Congress did not include the number of brakemen or helpers to be furnished.

Counsel also cite the case of Missouri Pacific R. R. Co. v. Norwood, 283 U. S. 249, as an authority for their contention that by the provisions of the Interstate Commerce

Act, above set forth, Congress has not taken charge of the field, and quote from pages 256 to 258 of the opinion in support of their contention. The language used in the quotation not only does not support appellees' position, but it supports our position. The opinion clearly shows that this Court did hold that by these provisions of the Interstate Commerce Act Congress had taken possession of the field relative to "supply of trains." All that this Court held was that the fact that Congress had taken charge of the field of the "supply of trains" did not take possession of the field concerning how many men should be employed on a train. In other words, the opinion shows that Congress had taken charge of the field so far as supply of trains is concerned. The number of men that operate these trains is immaterial to the supply of trains, and this opinion supports our position that Congress, by reason of the provisions of the Interstate Commerce Act, has taken charge of the field as to the supply and equipment of trains and whether or not a caboose should be attached to runs of this character.

The definitions of "common carriers," "railroad" and "transportation," as contained in paragraph 3 of Section 1 of the Interstate Commerce Act, U. S. C. A., Sup., Title 49, p. 6, clearly sustain our contention. A "railroad" by that section is defined, among other things, as including all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated, including all freight depots, yards and grounds used or necessary in the transportation or delivery of any such property. The term "transportation" is defined as including locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage.

Paragraph 10 of Section 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 101, defines "car service" as

including the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier or railroad subject to the chapter.

Paragraph 11 of Section 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 102, makes it the duty of every carrier by railroad subject to the chapter to furnish safe and adequate car service, and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service.

Paragraph 12 of Section 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 109, takes jurisdiction of the distribution of coal cars.

Paragraph 13 of Section 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 115, authorizes the Commission, by general or special orders, to require all carriers by railroad to file from time to time their rules and regulations with respect to car service.

Paragraph 14 of Sec. 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 115, authorizes the Commission, after hearing, on complaint, or on its own motion, to establish reasonable rules, regulations and practices with respect to car service by carriers by railroads subject to the chapter, including compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using it, and authorizes the establishment of penalties for nonobservance of such rules, regulations and practices.

Paragreph 15 of Sec. 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 116, gives the Commission certain extraordinary powers in case of emergency.

Paragraph 16 of Sec. 1 of the Act permits the Commission to authorize the rerouting of traffic on failure of the initial carrier to serve the public.

Paragraph 17 of Sec. 1 of the Act authorizes the Commission to give directions as to car service and as to all matters referred to in paragraphs 15 and 16 of the act.

Paragraph 21 of Sec. 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 132, gives power to the Commission to order a carrier to provide itself with safe and adequate facilities for performing as a carrier its car service as that term is used in the act.

As held in the case of Penn. R. Co. v. Public Service Com., 250 U. S. 566, under the Safety Appliance Act, supra, and the Power Brake Provision Act, supra, Congress has given the Interstate Commerce Commission full jurisdiction over the construction of cabooses and cars. Furthermore, the Transportation Act of 1920, as construed by this Court in Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456-478, covers the situation. Therefore, all that this Court held in the Norwood case, supra, was that these provisions of the Interstate Commerce Act did not empower the Commission to fix the number of men to be employed in train or switching service, although the decision did support our position that the supply of trains, car service, facilities, etc., were within the jurisdiction of the Interstate Commerce Commission by reason of the provisions of the Interstate Commerce Act.

It is clear that the statutes that we have mentioned, in addition to the Railway Labor Act, clearly show that Congress had taken jurisdiction of the field. It has not passed any legislation other than to give jurisdiction to the Interstate Commerce Commission to make rules, etc., for safe and adequate car service, but having taken possession of the field, as we have shown, it is immaterial whether it has taken possession of the particular part of the field involved in this litigation.

This Court held in Penn. R. R. Co. v. Public Service Com., 250 U. S. 566, that Congress has taken over the field

relative to certain matters connected with cabooses. In that case the complaint alleged that in violation of a state statute, the railroad company ran a specified train, the last car of which was not equipped at its rear end with a platform 30 inches in width, guard rails and steps. The train was moving in interstate commerce. The Court, speaking through Mr. Justice Holmes, held the statute unconstitutional because Congress had taken jurisdiction of the subject; and, in referring to the caboose situation, Mr. Justice Holmes said, l. c. 569:

> "The Safety Appliance Act with its careful requirements for the safety of the men was followed by most elaborate regulations issued by the Interstate Commerce Commission which include three large pages of prescriptions for 'caboose cars without platforms.' Caboose cars are constantly used as end cars and these pages, like the Post Office order as to mail cars, recognize the lawfulness of an end car such as the Pennsylvania statute forbids.
>
> "The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case. The subject matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here. The Interstate Commerce Commission is continually on the alert, and if the Pennsylvania law represents a real necessity, no doubt will take or recommend steps to meet the need."

In other words, this Court held that Congress having taken charge of all matters connected with the construction of cabooses and mail cars, the states were powerless to legislate. The logical result of this decision is that Congress has taken full jurisdiction of the matter of

cabooses, including their construction, equipment, where they shall be placed in the train and whether they shall be placed at all on trains. The dissenting opinion of Mr. Justice Clark, l. c. 570, acknowledges this construction of the majority opinion.

It is immaterial whether the Interstate Commerce Commission has issued regulations as to when cabooses should be used, i. e., "adequate and safe car service," for Congress has taken possession of the entire field and placed the administration of it in the Commission. If a state cannot say what safety provisions shall be made, as held in the Pennsylvania case, supra, then it cannot require a particular type of car to be placed on the ends of trains, nor can it require any caboose to be used on any interstate runs.

The late cases of Illinois Natural Gas Co. v. Central Illinois Public Service Co., 86 L. Ed. 322, and Clover Leaf Butter Co. v. Patterson, 86 L. Ed. 486, also sustain our position on this point.

While not authority, except by reason of the persuasive nature of the opinions, we call attention to the opinions of the three-judge courts in A. T. & S. F. Ry. v. LaPrade, 2 Fed. Supp. 855, and Southern Pac. R. R. Co. v. R. R. Com. of Cal. et al. (B. of R. T., Intervenors), reported in 10 Fed. Supp. 918. Concurring opinion of Mr. Justice Jackson in Duckworth v. Arkansas, 314 U. S. 390, 62 S. Ct. 311, cited by appellee.

We have already pointed out by record citation that the evidence is undisputed that the furnishing of cabooses has always been treated as a working condition.

The Los Angeles depot case, viz., R. R. Com. v. Southern Pacific, 264 U. S. 331, does not militate against our position, but, on the contrary, supports our contentions.

Northwestern Bell Telephone Co. v. Nebraska, 297 U. S. 471, merely sustained the right of Nebraska to require telephone companies to use a depreciation rate fixed by

the State Commission for the purpose of determining values as to intrastate rates. This Court merely construed the wording of the particular statute involved and held that it did not restrict control until the Interstate Commerce Commission had acted. Furthermore, the part of the opinion quoted applies solely to the use of such a depreciation factor for the determination of rates for intrastate telephone service, and there was no attempt to require such depreciation rate to be used in determining rates for interstate telephone service.

Kelly v. Washington, 302 U. S. 1, limits the right of the states to deal with local exigencies where such conditions exist in the absence of conflict with federal legislation. Neither does this case militate against our contention that if Congress occupies the field, state legislation is prohibited. All that it does hold is that under certain circumstances Congress may by its acts limit the field upon which the legislation operates.

The same answer may be made to the cases of Eichholz v. Public Service Com. of Mo., 306 U. S. 268, and Welch v. N. H., 306 U. S. 79. We do not feel justified in discussing these cases further within the limited scope of a brief of this character. That more properly comes when the case is argued upon its merits.

The Order Deprives Appellant of Its Property Without Due Process of Law.

Counsel next argue that no substantial federal question is raised as to violation of the Fourteenth Amendment. We covered this matter rather fully in our statement as to jurisdiction, and we do not repeat those authorities here.

Appellees state that there is no substantial federal question raised under our contention that the expense involved and the delay to interstate commerce by reason of the enforcement of this order are so great when compared with

the benefit accruing to the one man who could use a caboose that to enforce this order would deprive appellant of its property without due process of law. Counsel do not dispute our statement of the law as contained in our statement as to jurisdiction; in fact, they agree with it. The facts are before the Court. Whether the delay be eleven minutes or forty minutes per run, whether the cost of establishing cabooses be $44,000.00 or $250,000.00, whether the annual expense under normal conditions, to say nothing of present conditions, would be $62,000.00 or $150,000.00, is immaterial in this case. Counsel discuss the facts in detail. We have stated the facts as we understand them, and under the authorities cited in our statement as to jurisdiction, we respectfully submit that the expense and delay incident to appellant in order to comply with the order is so exorbitant and unreasonable when compared with the benefits accruing therefrom, and said benefits to the one man are so disproportionate to the cost thereof to appellant that to enforce this order would deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. Of course, there are some hazards when trains are operated without cabooses that do not exist when cabooses are furnished, to the same extent as there is more hazard in operating a train than in not operating it. However, this record shows such a slight benefit to one person in proportion to the expense involved and the delay incident to interstate commerce by reason thereof that we submit it raises a substantial question as to whether the order violated the Fourteenth Amendment to the Constitution of the United States.

The cases that we have cited show many instances where the expense was far less than it is in this case and the benefits to employes or the public far more, where this Court has held the statutes and regulations unconstitutional in the face of the Fourteenth Amendment.

In conclusion, it is submitted that the only question involved on this motion is whether the federal questions raised are substantial. A decision upon that question does not decide the merits of our contention. We do submit, however, that we have clearly shown, not only by our statement of jurisdiction but also by the opinion of the Supreme Court of Illinois and by this brief, that the federal questions raised by us are substantial and important, and ought to be fully considered by this Court upon full briefs and argument, and not to be disposed of on a mere motion of this kind and character. The present war, together with the great increase in freight transported mainly for war purposes, emphasizes the importance of the case. While the situation would be bad enough under normal conditions if this order were made effective, it would be intolerable under present war conditions when the avoidance of unnecessary delays in transportation may mean a battle won or many lives saved.

We, therefore, respectfully ask that this Court note probable jurisdiction in the matter and deny the motion to dismiss the appeal and the alternative motion to affirm; for the reasons set forth in our statement as to jurisdiction and in this brief, and in order that the substantial and important questions here raised may be determined by this Court upon their merits, after full presentation and argument.

All of which is respectfully submitted.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No. 218.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative, and ILLINOIS COMMERCE COMMISSION.

Appeal from the Supreme Court of the State of Illinois.

BRIEF FOR APPELLANT.

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Appeal from the Supreme Court of the State of Illinois.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion, findings and order of the Illinois Commerce Commission in this case appear in the printed record (R. 1 to 13), as well as the dissenting opinion of Commissioner Olson (R. 13 to 15).

The order and judgment of the Circuit Court of St. Clair County, Illinois, reversing the order of the Commission on the ground that that portion of the order of the Commission requiring cabooses to be attached to trains moving

between the States of Illinois and Missouri over the Eads Bridge and the Merchants Bridge was an interference with interstate commerce and beyond the jurisdiction of the Illinois Commerce Commission, likewise appears in the record (R. 203).

The opinion of the Supreme Court of the State of Illinois is reported in 379 Ill. 403, and also in 41 N. E. (2d) 481; it also appears in the record (pp. 235 to 249).

The order of the Supreme Court of Illinois of May 12, 1942, denying without opinion appellant's petition for a rehearing and thereby making the opinion final is likewise in the record (R. 266).

JURISDICTION.

The opinion of the Supreme Court of Illinois was filed on March 16, 1942 (R. 235). Petition for rehearing was denied by the Supreme Court of Illinois, thereby making its opinion final, on May 12, 1942 (R. 266). Appeal to this Court was applied for and granted by the Chief Justice of the Supreme Court of the State of Illinois on June 11, 1942 (R. 281), and the transcript of record was filed in the office of the clerk of this court on July 10, 1942 (R. 290). Briefs were filed by both parties on the question of the jurisdiction of this Court on appeal. Appellee also filed a brief in support of its motion to dismiss or affirm and appellant filed a reply brief in opposition thereto. This Court on October 12, 1942, noted probable jurisdiction of this appeal.

The jurisdiction of this Court on appeal is invoked under Sec. 237 (28 U. S. C. A. 344) and Secs. 861a and 861b of the United States Code (28 U. S. C. A. Supp., pp. 51-52), on the ground that there was drawn in question in this case the validity of a statute of a state on the ground that it is repugnant to the Constitution and laws of the United States, and the decision in the Supreme Court of Illinois was in favor of its validity; and permitting direct appeal to this Court under such circumstances.

This Court has held that an order of the State Commission, being legislative in its nature and made by an instrumentality of the state, is a state law within the meaning of the Constitution of the United States and the laws thereof regulating the jurisdiction of this Court on appeal. *L. E. & W. R. R. Co. v. State Public Utilities Comm. of Illinois ex rel.*, 249 U. S. 422, l. c. 424, and cases cited therein; *Live Oak Water Users Assn. v. R. R. Comm. of Cal.*, 269 U. S. 354.

STATEMENT OF THE CASE.

On March 4, 1938, appellee, Brotherhood of Railroad Trainmen, by its Chairman and State Legislative Representative, filed with appellee, Illinois Commerce Commission, its petition, alleging that appellant here was a public utility, subject to the provisions of the Act of the State of Illinois providing for the regulation of public utilities; that appellant had failed to provide caboose cars for switchmen in the territory in, around and about East St. Louis, Illinois, and as a result thereof switchmen in the performance of their duties on transfer runs were necessarily required either to ride on the drawbar, in between freight cars, or on the top of, or on the side of freight cars, where numerous reduced vertical and horizontal clearances prevail, thus endangering the life, health and safety of the aforesaid switchmen of transfer cars and of other employes of appellant and of the public within the State of Illinois (R. 16). The petition prayed that appellant be required to answer the charges, and that the Illinois Commerce Commission would make such order in the premises as might seem meet.

Appellant answered this petition, denying the allegations thereof, expressly denying that the Commission had any power, right or authority to enter any order in regard to

the subject matter of the complaint so far as any movements in interstate commerce were concerned, and expressly averring that so far as interstate movements of trains or cuts of cars were concerned, the Commission had no power, jurisdiction or authority to enter any order requiring cabooses upon interstate runs between the State of Illinois and the State of Missouri; and expressly raised the question of the jurisdiction of the Commission so far as any interstate runs or movements were concerned (R. 17). As detailed in our printed statement as to jurisdiction, all other questions raised herein were properly raised before the Commission and passed on by it and by the Supreme Court of Illinois, adversely to appellants' contentions there and here.

On February 1, 1940, the Illinois Commerce Commission entered its findings and order in this cause (R. 1 et seq.). By said order, after extensive findings as to the need of caboose cars, the Commision found by its Finding 34 (R. 11), that it was reasonable to require appellant to furnish, maintain and operate caboose cars throughout the year on its transfer delivery and industrial runs, twenty in number, between certain of its yards located in the State of Illinois; and likewise, by its Finding 35 (R. 12), found that it was reasonable to require appellant to furnish, maintain and operate caboose cars throughout the year on its transfer delivery runs in the State of Illinois on all runs over the Eads and Merchants Bridges between the States of Illinois and Missouri. After making such findings, the Commission ordered (R. 12) that appellant be required and directed to furnish, maintain and operate caboose cars on its transfer, delivery and industrial runs, more specifically set forth in Finding 34 of the order, within sixty days from the date of the service of the order, and likewise that appellant be required and directed to furnish, maintain and operate caboose cars on its transfer and delivery runs, more specifically set forth in Finding 35

of the order, within thirty days after the date of the service of the order (R. 12).

The Commission also by its order (R. 13) expressly denied the motion of appellant to dismiss the proceedings for want of jurisdiction.

Of the five members of the Commission, three voted in favor of the findings and order of the Commission, and one Commissioner dissented as to the bridge runs covered by Finding 35 on the ground that the part of the order of the Commission based on Finding 35 was an attempt improperly and unlawfully to regulate interstate commerce and therefore beyond the jurisdiction of the Commission (R. 13).

Appellant, complying with the statutory requirements, filed an application for rehearing before the Commission, which application was denied. Appellant then appealed to the Circuit Court of St. Clair County, Illinois, where the cause, as provided by the Illinois statutes, was heard on the record made before the Commission. On July 26, 1940, the Circuit Court of St. Clair County, Illinois, without opinion and passing only upon that portion of the order requiring caboose cars on runs across the bridges, found that that part of the order of the Commission requiring cabooses to be attached to runs moving between the States of Illinois and Missouri over the Eads and Merchants Bridges was an interference with interstate commerce and was beyond the jurisdiction of the Illinois Commerce Commission. The Circuit Court further found that under the decision rendered by the Supreme Court of Illinois in the case of *Brotherhood of Railroad Trainmen v. E. J. & E. Ry. Co.*, 374 Ill. 60, the power of the Circuit Court was limited to either affirming in its entirety or setting aside in its entirety the order of the Commission. The Circuit Court, under the last-mentioned decision, therefore, having found that the order was bad in one respect, did not pass upon

any other questions in the case for the reason that under said decision, if the order of the Commission was erroneous in one respect it must necessarily be set aside. The order and judgment of the Circuit Court appear in the Record at pages 203-204. In its opinion in the instant case (R. 238) the Supreme Court of the State of Illinois reiterated and reaffirmed the procedural law as found by the Circuit Court. After making such findings, the Circuit Court ordered and adjudged that the said order and decision of the Illinois Commerce Commission in said cause be and the same was reversed and set aside. Appellees in this proceeding then duly perfected an appeal from the order and judgment of the Circuit Court to the Supreme Court of the State of Illinois, which Court, on March 16, 1942, handed down an opinion reversing the order and judgment of the Circuit Court and remanding the cause to the Circuit Court, with directions to enter an order confirming the order of the Illinois Commerce Commission (R. 249).

The Supreme Court of Illinois, on May 12, 1942, denied without opinion appellant's petition for rehearing.

Appellant was allowed and duly perfected an appeal to this Court, and this Court has noted probable jurisdiction of this cause on appeal.

The Supreme Court of Illinois passed not only upon the one question decided by the Circuit Court, but, as it had a right to do under the decision in *People v. Bradford*, 372 Ill. 63, l. c. 65-66, passed on all of the other questions involved in the case.

Later, under appropriate headings, we shall consider more in detail the opinion of the Supreme Court of Illinois.

Appellant is a railroad corporation, engaged wholly as a terminal and switching carrier engaged in yard operations, and its freight trains do not run on any regular schedule such as those of trunk lines do (R. 212). In

Illinois it has three large yards, each of which consists of a number of tracks ranging in capacity from ten to seventy cars each, and with a very large number of tracks in each yard (R. 6). In each of these yards during each eight-hour period during the entire twenty-four hour day, there are many switch crews engaged in breaking up and making up trains and in transporting such trains when made up either to one of the other yards in Illinois or to the yards of trunk lines in Illinois or to one of the four or five yards of appellant in Missouri (R. 6-7). In addition, appellant makes transfer deliveries to certain other railroad yards of trunk lines in Illinois (R. 7).

Two railroad bridges operated by appellant span the Mississippi River, joining the East St. Louis district with St. Louis, Missouri, the bridges being known as the Eads Bridge and the Merchants Bridge. There are only two railroad tracks on each of the bridges (R. 75-237). As to all of the bridge runs, obviously nothing is transported except in interstate commerce (R. 76). On the transfer runs between the yards of appellant in Illinois and between these yards and other trunk line yards in Illinois, 98% of the merchandise transported is carried in interstate commerce (R. 80). About 68 passenger trains cross the Eads Bridge every day and in the early part of the week about the same number of freight trains cross that bridge each day, while in the latter part of the week the number of freight trains exceeds the number of passenger trains (R. 76). Approximately the same number of trains cross the Merchants Bridge every day (R. 217). These train movements at the time of the trial aggregated about 136 trains on each bridge each day, or an average of a train each ten minutes on each bridge. We think the Court will take judicial notice that at such a large gateway these train movements have greatly increased, due to large movements of troops and war materials.

As appellant's witness Davis said, and his testimony is undisputed (R. 76):

> "It would not be possible to cut a caboose in the middle of the river. We have no place to do it. Two trains would tie up the main tracks. The only practical way of doing that would be to start in Missouri on a movement to Illinois to our yard and bring the caboose the whole way or from Illinois to Missouri of taking it to Missouri. The same situation would apply to the Merchants Bridge."

At the west end of the Eads Bridge the tracks enter a tunnel which runs for about one mile under the City of St. Louis (R. 77). There are only two railroad tracks on each of the two bridges and likewise only two tracks through the tunnel. If cabooses were required on these bridge runs, it would be necessary on both bridges on runs to Missouri to attach the caboose in the yards in Illinois where the cut is made up and carry the caboose across the bridge (and when moving over the Eads Bridge, through the tunnel) into Missouri to the yards that the cut is destined to; and on runs from Missouri to Illinois it would be necessary likewise as to both bridges to attach the caboose in the yards in Missouri (and when moving over the Eads Bridge, ran through the tunnel in Missouri), across the bridge and carry it to the yards in Illinois (R. 76). In other words, the order itself, although on its face limiting the provisions from and to the State line—the middle of the river—as a practical proposition requires cabooses, both coming into and going from Illinois, to be carried in Missouri between the middle of the river and a yard in Missouri (R. 76).

The only practical way to comply with the Commission's order would be to start in Missouri on movements to Illinois at the yards in Missouri and bring the caboose the whole way to the yards in Illinois; and on a movement from Illinois to Missouri to attach the caboose in

the yards in Illinois and take it to the yards in Missouri. This situation applies to both bridges (R. 76).

Furthermore, R. B. Thomas, Chief Railroad Inspector for the Commission, who testified as a so-called Commission witness, corroborated the testimony of appellant's witnesses upon these points. Thomas stated (R. 98), "All these runs over these two bridges either come from the State of Missouri to Illinois or go from the State of Illinois to the State of Missouri." Thomas further stated (R. 99), "As a practical proposition, to put cabooses on those runs across the river would require them to be hauled on over to St. Louis on runs from Illinois and put on the train on the runs in Missouri to bring them into Illinois, from the observation I made on the bridge, as I did not see any places cabooses could be set out in Illinois. If a caboose was taken to the middle of the river on either of these bridges, either westbound or eastbound, as a practical railroading proposition it would be necessary to take them on to the other side of the river."

Furthermore, the Illinois Supreme Court in its opinion (R. 238) said: "Though the Commission's order applies only to cuts of cars moving within the state, it is argued by appellee, and not disputed, that the only practical way in which the order can be carried out on runs across the river is to carry these cabooses across the bridge into appellee's yard on the opposite side of the river."

Furthermore, the Supreme Court of Illinois in its opinion (R. 242) said: "As to finding No. 33, which involves cuts of cars taken across the river into Missouri, counsel for appellee earnestly argue that, since there are no means of leaving a caboose at the State line, where it could be picked up on return, the only practical way in which compliance with the order of the Commission may be had is to carry such caboose with the cut of cars into its yards in Missouri and attach it in Missouri, and bring it back over the bridges so as to comply with the order within

the State. This, appellee contends, is, in practical effect, a regulation of the movements of the appellee's trains in the State of Missouri, which is beyond the power of this State or its Commission."

Furthermore (R. 246), the Supreme Court of Illinois in its opinion, in referring to our contentions, said: "They point out that if cabooses are required on these interstate switching runs, appellee will necessarily have to transport them for some distance in Missouri, and Missouri could enact conflicting regulations."

Furthermore, in its opinion (R. 246), the Supreme Court of Illinois said: "Does the fact, if such be a fact, that the only practical method of complying with the order would be to haul these cabooses into Missouri of itself render the order of the Commission invalid as a direct burden upon interstate commerce?"

Obviously, a caboose could not with this traffic be left on the other main track at the state line on movements to Missouri and remain there until picked up by a train coming from Missouri to Illinois.

There was some dispute as to whether or not there were any crossovers on the bridge so that this could be done as an actual movement. The Commission's inspector, Thomas (R. 100), testified that there were no crossovers from one track to another on the Merchants Bridge in Illinois, but that there were perhaps two crossovers on the approach to the Eads Bridge in Illinois. Another witness, Jenkins (R. 21), testified that there was a crossover on the Merchants Bridge about 700 feet from the water line in Illinois, so that trains could be transferred from one track to another when necessary, and that there was a like crossover on the Eads Bridge, but he was not certain whether that was in the State of Illinois or not. He further testified (R. 21) that it would be possible to put crossovers on these bridges in the State of Illinois. Appellant concedes that it would be possible to do so, but

contends that the undisputed evidence shows that with the hundreds of trains running every day over these bridges, with only two main tracks on each bridge, and only two main tracks in the tunnel, it would be impossible to cut a caboose from one main track to another main track and leave it on the other main track until it was next used, even though crossovers existed, and that such a practice in itself would directly hinder, obstruct and impede interstate commerce.

The furnishing of cabooses has always been considered a working condition and has been dealt with as such by appellant and its switchmen, and cabooses have always been since 1910 and are being furnished by reason of written contracts between the Brotherhoods and appellant (R. 82).

Cabooses were furnished by agreement with the Brotherhoods under written contract. On this question the record is clear (R. 79, 81-82). In 1910 three cabooses were furnished by agreement (R. 81), and these were gradually increased by further agreements with the Brotherhoods until at the time of the trial thirty-one cabooses were in use. In each instance these agreements were made with the men through their Brotherhood representatives, and the current agreement between appellant and the Brotherhoods as to cabooses is shown in the record in full (R. 82); and it clearly recognizes the matter of furnishing of cabooses to be a working condition and always treated as such.

The undisputed evidence in the record (and in its opinion the Supreme Court of the State of Illinois so found) shows that all merchandise carried over the two bridges on the bridge runs, covered by Finding 35, was being transported in interstate commerce; that 98% of the merchandise carried in the inter-yard runs in Illinois, covered by Finding 35, was being transported in interstate commerce; that on bridge runs cabooses cannot be attached or dis-

connected at the State line, which is the middle of the river, but that as a practical proposition on both east-west and west-east movements, the necessary effect of the order is to require appellant on east-west movements, after they cross the State line, to carry the caboose across the river (and when using the Eads Bridge, through the tunnel a mile in length), and a considerable distance further to a yard in Missouri; and that likewise, on west-east movements, in order to comply with the order, after the State line is crossed, the caboose must be attached in the yards in Missouri (and when using the Eads Bridge, carried through the same tunnel in Missouri) and half way across the bridge to the State line in order that cabooses may be on the runs while they are in the State of Illinois. In other words, the order of the Commission not only directly impedes, hinders and delays interstate commerce, but also from a practical standpoint requires compliance in Missouri, where the Illinois Commerce Commission had and has no power, jurisdiction or authority.

Appellant's testimony (R. 81, 111, 115) shows that there would be a 40-minutes delay on each round trip if cabooses were put on these runs, and (R. 119) an added delay if cabooses were placed on the runs to the Pennsylvania Railroad, where the delay (R. 119-120) would be from 50 minutes to an hour. This added cost by using the cabooses would amount to $10.00 per run (R. 81), based upon an average 40 minutes delay on each run. This, according to appellant's testimony (R. 81), would entail a cost to appellant for the first year of $400,000, divided $150,000 for new cabooses and $250,000 on account of added expenses due to delay in switching, and after the first year would entail added expense of $250,000 per year (R. 82).

It was further shown that the value of a switch engine, including use of engine, fuel and the wages of the train crew, is computed at $100.00 for each eight hours of use (R. 81). The Commission's inspector, Thomas, testified

(R. 88 and 219) that in the 20s, when he worked for the Illinois Central, the charge for an engine and crew was $75.00 for an eight-hour day, and he would not be surprised if this was now increased to $100.00 per day.

Appellant's Exhibit 36 (R. 231) shows a large number of these movements on a typical day, and fully substantiates appellant's contention as to the cost. The evidence showed that 50 additional cabooses would be needed (R. 112) in addition to the 31 cabooses now in use. Appellee's testimony showed that the delay would average eleven minutes per run; that the initial cost of new cabooses would be $44,000 and the extra annual expense in wages about $62,000, but this estimate would not include anything except wages. Inspector Thomas' testimony was based on certain tests, of which advance information had been given to everyone concerned in the yard (R. 111). It was a "show run" and was given preference over everything, where, regularly, they would have to take the cars, get the caboose when they could and get out when they could (R. 111). The evidence further showed that in actual practice the delays would be many times greater than shown by the test runs (R. 111). Furthermore, Inspector Thomas' figures as to original cost refer only to shelter cars and not to caboose cars, which are the kind of cars required to be furnished under the order of the Commission. This dispute as to the cost is more or less immaterial because the Supreme Court of Illinois found that the delay on each run would be from eleven to forty minutes (R. 242).

The undisputed evidence showed that if cabooses were attached to these runs, the caboose would be used only by one employe out of five on each run, and by that employe for only from one-sixth to one-eighth of the time that he worked, and during the balance of his working period he would be exposed to the same hazards and, in fact, additional hazards. This statement is verified by the undisputed testimony of Witness Davis (R. 221) to the effect

that the caboose would only be available for the use of the rear switchman, who could only ride it when it moved between one yard and another, and the other testimony to the same effect (R. 110). The balance of the time the rear switchman would be engaged in switching cars, coupling or uncoupling the same, making or breaking up trains, flagging crossings and doing other work incident to switching. The statement that the one rear switchman would only use a caboose for from one-sixth to one-eighth of his working time is based upon the exhibits showing the time between yards and connections and the number of movements of the various crews (R. 224 to 228).

The rear switchman could only use a caboose between yards. For example (R. 140), on the run to the Pennsylvania, the rear switchman would spend only eleven minutes in the caboose and the rest of the time he would not be able to use the caboose. The running time between yards (R. 224-226) is from fifteen to thirty minutes, with one exception, and on that run cabooses are furnished.

The distance between yards varies as to the 20 so-called Illinois runs from 6,800 feet to 41,000 feet; four of these are less than 10,000 feet apart; 10 are from 10,000 to 20,000 feet apart, and six are over 20,000 feet apart (R. 226-227). On some of these longer runs cabooses are furnished the entire year, and on some of them from October 15 to May 15 (R. 81). A rear switchman (R. 82) only uses a lantern by night and a flag by day; he has no other equipment and consequently needs no place to store it (R. 116, 219). The men quit at the same place where they report (R. 110). There are sixteen service stations in the three yards in Illinois at various places, giving ample facilities for storage of street clothes, lunches, etc. (R. 232-233), and there is also a seatbox in the engine for that purpose (R. 110).

Appellant has been losing money for years, the net loss for the seven years before the hearing being over $1,300,

000, or an average yearly loss for the seven years of nearly $200,000 (R. 229). For the first six months of 1938, while the hearing was in progress (R. 229), a loss of over $1,000,000 was sustained, and in July, 1938, when the case was being tried, appellant suffered a loss of over $112,000. The same figures were shown by the income tax reports (R. 228).

In one typical day of 24 hours, there were 29 movements from Cabin No. 1 in CD Yard; 25 movements to and from St. Louis district; 50 movements through Bridge Junction; six movements over the Merchants Bridge; 39 movements in and out of Madison Yard; 21 movements of west side crews into and out of Madison Yard; 71 movements into and out of Wiggins Yards 2 and 5; eight movements from CD Yard to the Pennsylvania; nine to the Alton; 11 to the Wabash, and 10 to the Big Four (R. 231).

From 1928 to 1936 (R. 228) there were eight injuries to employes in cabooses, one on the rear end and seven while riding on cars, showing that in nine years, out of 16 accidents, eight happened to men riding in cabooses, seven while riding on cars and only one while riding on the rear end.

Very few of the lines around St. Louis use cabooses in deliveries to appellant (R. 68). On one of the runs shown by Thomas' testimony, where the test showed a delay of two minutes for the caboose, if there had not been advance notice given and everybody lined up to do a specific move, if it was a regular and ordinary move, it would take from 30 to 40 minutes to get the caboose and put it on the train, get the caboose on the return trip from the I. C., bring it back to the CD Yard and put it away (R. 111). To the same effect is the testimony (R. 137). The delays would average 40 minutes on every delivery made with a caboose out of all of the yards involved (R. 115).

These figures are for a period three or four years ago. With the increased business and necessity of expeditious movement caused by war conditions, the delays and consequent expense to appellant to comply with this order would be vastly more than shown by the record.

The fact that some other railroads in the territory furnish cabooses has no bearing on the questions involved on this appeal.

As to the runs involved in finding 35 (the bridge runs), the questions of delay, expense and extraterritorial effect are involved; while as to the runs involved in finding 34 (the interyard runs), the questions of delay and expense only are involved.

The Supreme Court of Illinois in its opinion (R. 235) substantially found the facts to be as set forth in this statement.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order in question of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States so far as the runs described in Finding 35 were concerned, viz.: the bridge runs; and in holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was not a direct burden on interstate commerce and did not directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic; and in holding, deciding and determining that the necessary effect of said order as to said runs was not directly to burden interstate commerce by requiring a like compliance in the State of Missouri, where the Illinois Commerce Commission has no power, jurisdiction or authority; and in holding, deciding and adjudging that such a burden on interstate commerce was not repugnant to the interstate commerce clause of the Constitution of the United States, viz.: Section 8 of Article I thereof (R. 275).

2. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 35 were concerned, viz.: the bridge runs; and in not holding, deciding and adjudging that even if Congress had not legislated upon the subject the effect of the order as to such runs was and is a direct burden on interstate commerce and directly burdens or impedes interstate traffic or impairs the usefulness of facilities for such traffic; and in not holding, deciding and determining that said order as a practical proposition, created a direct burden on interstate commerce by requiring a like com-

pliance in the State of Missouri, where the Illinois Commerce Commission had no power, jurisdiction or authority; and in not holding, deciding and adjudging that such a burden on interstate commerce was repugnant to the interstate commerce clause of the Constitution of the United States, viz.: Section 8 of Article I thereof (R. 276).

3. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States so far as the runs described in Finding 34 were concerned, viz.: the inter-yard runs in Illinois, which contained 98% of interstate freight; and in not holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was not a direct burden on interstate commerce and did not directly burden or impede interstate traffic or impair the usefulness of facilities for such traffic; and in holding, deciding and adjudging that such a burden on interstate commerce was not repugnant to the interstate commerce clause of the Constitution of the United States, viz.: Section 8 of Article I thereof (R. 276).

4. The Supreme Court of the State of Illinois erred in not holding, deciding and adjudging that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States so far as the runs described in Finding 34 were concerned, viz.: the inter-yard runs in Illinois, which contained 98% of interstate freight; and in not holding, deciding and adjudging that even if Congress had not legislated upon the subject, the effect of the order as to such runs was and is a direct burden on interstate commerce and directly burdens or impedes interstate traffic or impairs the usefulness of facilities for such traffic; and in not holding, deciding and adjudging that such a burden on interstate commerce was

repugnant to the Constitution of the United States, viz.: Section 8 of Article I thereof (R. 276).

5. The Supreme Court of the State of Illinois erred in holding that Congress had not taken charge of the field relative to the furnishing, maintenance and operation of caboose cars as to runs mentioned in both Findings 34 and 35; and in holding, deciding and adjudging that the State could legislate in the field even though the effect upon interstate commerce was indirect, and even though Congress had not legislated as to the particular matters involved, and under such circumstances, in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and was not repugnant to the interstate commerce provisions of said Constitution, contained in Section 8 of Article I thereof (R. 277).

6. The Supreme Court of the State of Illinois erred in not holding, deciding and adjudging that Congress had taken charge of the field relative to the furnishing, maintenance and operation of caboose cars as to all of the runs mentioned in both Findings 34 and 35, and that therefore, inasmuch as Congress had taken charge of the field by appropriate legislation, the State of Illinois could not legislate in that field, even though the effect upon interstate commerce was indirect, and even though Congress had not legislated as to the particular matters involved; and in not holding, deciding and adjudging that for these reasons the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States, and particularly repugnant to the interstate commerce provisions of said Constitution contained in Section 8 of Article I thereof (R. 277).

7. The Supreme Court of the State of Illinois erred in holding, deciding and adjudging that the order of the Illinois Commerce Commission as to all of the transfer runs was not unreasonable because of the exorbitant ex-

pense required in order to comply with it, and in holding that such expense of compliance with the order was not so exorbitant when compared with the benefits accruing therefrom, nor were the said benefits so disproportionate to the cost thereof that the enforcement of the order would not deprive appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States, and in holding, deciding and adjudging that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto (R. 277).

8. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission as to all of the transfer runs was unreasonable and arbitrary because of the exorbitant expense required in order to comply with it; in not holding that such expense of compliance with the order was not exorbitant when compared with the benefits accruing therefrom and the said benefits so disproportionate to the cost thereof that consequently the enforcement of the order would deprive appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States; and in not holding, deciding and adjudging, for the reasons set forth in this assignment of errors, that the order of the Illinois Commerce Commission was invalid for the reason that it was repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, by depriving appellant of its property without due process of law (R. 278).

9. The Supreme Court of the State of Illinois erred in holding that the said order of the Illinois Commerce Commission was not repugnant to the interstate commerce clause of the Constitution of the United States contained in Section 8 of Article I thereof (R. 278).

10. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission was invalid and repugnant to the interstate commerce clause of the Constitution of the United States contained in Section 8 of Article I thereof (R. 278).

11. The Supreme Court of the State of Illinois erred in holding that the order of the Illinois Commerce Commission was valid and not repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, prohibiting a state from depriving a person of his property without due process of law (R. 278).

12. The Supreme Court of the State of Illinois erred in not holding that the order of the Illinois Commerce Commission was invalid and repugnant to the Constitution of the United States, and particularly to the provisions of the 14th Amendment thereto, for the reason that said order deprives appellant of its property without due process of law (R. 278).

13. The Supreme Court of the State of Illinois erred in reversing the judgment of the Circuit Court of St. Clair County, Illinois, and in remanding the cause to said Circuit Court, with directions to confirm the order of the Illinois Commerce Commission (R. 279).

14. The Supreme Court of the State of Illinois erred in not affirming the order of the Circuit Court of St. Clair County, Illinois (R. 279).

SUMMARY OF ARGUMENT.

I.

The applicable Illinois statutes and decisions under which this case was considered by the Illinois Commerce Commission and by the Supreme Court of the State of Illinois.

II.

The opinion and decision of the Supreme Court of Illinois.

III.

Congress has taken charge of the field, viz., the matter of cabooses, and therefore a state cannot legislate in that field, even though the effect upon interstate commerce is indirect and even though Congress has not legislated as to the particular matters involved.

IV.

The order does directly burden and affect interstate commerce and does have extraterritorial effect and it is, therefore, invalid even though Congress has not taken charge of the field.

V.

The order deprives appellant of its property without due process of law.

VI.

Conclusion and prayer for reversal of the order and judgment of the Supreme Court of the State of Illinois.

ARGUMENT.

The Applicable Illinois Statutes and Decisions.

As was pointed out by the trial court in its order (R. 204), under the authority of *B. of R. T. v. E. J. & E. Ry. Co.*, 374 Ill. 60, which principle was reaffirmed by the Supreme Court in the instant case (R. 238), the power of the courts of Illinois on an appeal from an order of the Illinois Commerce Commission is limited to either affirming such order in its entirety or setting aside in its entirety the order of the Commission. In other words, under the practice in Illinois under these decisions, if the order of the Commission is bad in one respect it must be reversed, even though it may be good in all other respects. For that reason the Circuit Court limited its decision to the one point—that the order of the Commission requiring cabooses to be attached on trains moving between Illinois and Missouri over the two bridges was an interference with interstate commerce and beyond the jurisdiction of the Illinois Commerce Commission. Having found this part of the order invalid, the Circuit Court did not pass on any of the other questions raised, because, under the decisions aforesaid, this required a reversal of the order. However, under the practice in Illinois, and without assignment of error or cross appeal, appellant, who was the appellee in the State Supreme Court, had the right to, if it could, sustain the judgment upon any ground warranted by the record. *People v. Bradford*, 372 Ill. 63, l. c. 65-66. Appellant, as appellee in the court below, availed itself of this privilege and advanced all of the matters now set up in this court, and the Supreme Court of Illinois passed upon all of these questions.

Many other questions were raised in the State Supreme Court by appellant involving matters not properly cognizable on this appeal, and these questions were decided adversely to appellant.

We concede here that if we secure a reversal of this judgment we are limited to the constitutional and federal statutory questions here raised, and we concede further that we are bound by the findings of fact made by the Supreme Court of Illinois in its opinion. However, these findings of fact substantially sustain our factual contentions. It was in spite of these findings of fact sustaining our contentions that the Supreme Court of Illinois, as we contend, misapplied the law.

Appellees claim that the jurisdiction of the Illinois Commerce Commission of the matter involved arises under and by virtue of Sec. 32 (Ill. Rev. Stat. 1941, p. 2503); Sec. 50 (Ill. Rev. Stat. 1941; p. 2508), and Sec. 60 (Ill. Rev. Stat. 1941, p. 2512) of the Illinois Commerce Commission Act. The material parts of these sections are as follows:

"32. • • •

"Every public utility shall furnish, provide and maintain such service instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees, and public and as shall be in all respects adequate, just and reasonable.

"50. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or any two or more public utilities ought reasonably to be made or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected in the manner and within the time specified in said order. If any additions, extensions, repairs, improvements or changes, or any new struc-

ture or structures which the Commission has ordered to be erected, require joint action by two or more public utilities, the Commission shall notify the said public utilities that such additions, extensions, repairs, improvements or changes or new structure or structures have been ordered and that the same shall be made at the joint cost, whereupon the said public utilities shall have such reasonable time as the Commission may grant within which to agree upon the apportionment or division of cost of such additions, extensions, repairs, improvements or changes or new structure or structures, which each shall bear. If at the expiration of such time such public utilities shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs, improvements or changes, or new structure or structures, the Commission shall have authority, after further hearing, to make an order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured."

"60. The Commission, or any commissioner, assistant commissioner, or officer of the Commission designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning any matters covered by the provisions of this Act, or by any other Acts, relating to public utilities subject to such rules and regulations as the Commission may establish. In the conduct of any investigation, inquiry or hearing neither the Commission nor any commissioner, assistant commissioner or officer of the Commission shall be bound by the technical rules of evidence, and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner, assistant commissioner or an officer of the Commission shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission. All hearings conducted by the Commission shall be open to the public.

Each commissioner, each assistant commissioner, the secretary of the Commission, and every officer of the Commission designated by it to hold any inquiry, investigation or hearing, shall have the power to administer oaths and affirmations, certify to all official acts, issue subpoenas, compel the attendance and testimony of witnesses, and the production of papers, books, accounts and documents.

Hearings shall be held either by the Commission or by one or more commissioners, or assistant commissioners. All evidence presented at hearings held by the Commission or under its authority shall become a part of the records of the Commission. In all cases in which the Commission bases any action on reports of investigation or inquiries not conducted as hearings, such reports shall be made a part of the records of the Commission."

Appellant has from the outset consistently claimed that no such jurisdiction existed in the Commission because of the provision of Sec. 90 of the Illinois Commerce Commission Act (Ill. Rev. Stat. 1941, p. 2524), which provides as follows:

"90. Neither this Act nor any provision thereof shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except when specifically so stated, and in so far as the same may be permitted under the provisions of the Constitution of the United States and Acts of Congress, and the decisions of the Supreme Court of the United States."

We concede that under the decision of, and as construed by, the Supreme Court of Illinois, the statutes quoted are sufficient to give jurisdiction to the Commission to enter this order, and that under such construction the order is within the power of the Commission, unless, as we contend, it is invalid in some respect, as herein set forth, by being repugnant to the Constitution or laws of the United States.

The Opinion and Decision of the Supreme Court of Illinois.

We do not attempt to detail the opinion of the State Supreme Court, but shall here merely summarize the grounds upon which it reversed the order and judgment of the Circuit Court.

Summing up the conclusions of the Supreme Court of the State of Illinois, the Court decided:

1. That Congress had not taken charge of the field, viz.: the matter of cabooses.

2. That inasmuch as Congress had not taken charge of the field, the State had the right to pass legislation indirectly affecting and constituting an indirect burden on interstate commerce, and that the only limitation of the right of the State was that it could not pass legislation that would result in a direct burden on interstate commerce.

3. That even with the findings as to expense and delays, and with the finding that the effect of the order as to the bridge runs was to require, as a practical proposition, compliance with the order in Missouri, such facts did not constitute a direct burden on interstate commerce, but only indirectly burdened and affected same. This applies to the bridge runs covered by Finding 35.

4. That as to the inter-yard runs in Illinois covered by Finding 34, which contained 98 per cent interstate freight, the extra expense and the delays incident to interstate transportation constituted only an indirect burden on interstate commerce and did not create a direct burden thereon or directly affect the same.

5. That the expense of compliance with the order was not so exorbitant, when compared with the benefits accruing therefrom, and the said benefits were not so dis-

proportionate to the cost thereof, as to deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

6. That the order, because it is limited to the confines of the State of Illinois, does not purport to regulate interstate commerce, and that its effect must be determined from what it purports to do and not from what actually results.

On the other hand, appellant contends that these conclusions of the State Supreme Court are repugnant to the Constitution and laws of the United States as interpreted by the decisions of this Court. In other words, appellant contends that:

1. Congress has taken charge of the field, viz., the matter of cabooses, and therefore a state cannot legislate in that field, even though the effect upon interstate commerce is indirect and even though Congress has not legislated as to the particular matters involved.

2. Even if Congress has not taken charge of the field, yet a state under such circumstances only has the right to pass legislation indirectly and incidentally affecting interstate commerce.

3. That with the finding as to expense and delays; and with the finding that the effect of the order as to the bridge runs covered by Finding 35 was to require as a practical proposition compliance with the order in Missouri, such facts did constitute a direct burden on interstate commerce and not an indirect and incidental burden thereon.

4. That as to the inter-yard runs in Illinois covered by Finding 34, and which contained 98 per cent interstate freight, the extra expense and delays incident to inter-

state transportation constituted a direct burden on interstate commerce and not an indirect and incidental burden, as found by the State Supreme Court.

5. That the expense of compliance with the order was so exorbitant when compared with the benefits accruing therefrom, and such benefits were so disproportionate to the cost thereof, as to render the entire order invalid in that it deprived appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

6. That the order, because it is limited to the confines of the State of Illinois, and on its face does not purport to regulate interstate commerce, is not thereby made valid for the reason that the effect of the order must be determined not from what it purports to do but from what actually results from its enforcement.

We shall proceed to discuss these contentions:

Congress Has Taken Charge of the Field, Viz., The Matter of Cabooses, and Therefore a State Cannot Legislate in That Field, Even Though the Effect Upon Interstate Commerce Is Indirect and Even Though Congress Has Not Legislated as to the Particular Matters Involved.

As we understand the law, if Congress has taken charge of the field, a state cannot legislate in that field, even though the effect upon interstate commerce is indirect, and even though Congress has not legislated as to the particular matters involved. The question is whether Congress has taken possession of the field, and it is immaterial then whether it has legislated concerning a particular matter within the field. In support of this statement we cite: *Penn. R. R. Co. v. Public Service Com.*, 250 U. S. 566; *Southern Ry. Co. v. R. R. Com. of Ind.*, 236 U. S. 439;

Napier v. Atlantic Coast Line, 272 U. S. 605. To the same effect are: *Staten Island Rapid Transit Co. v. P. S. C.*, 16 F. (2d) 313; *Southern R. Co. v. U. S.*, 222 U. S. 20, 56 L. Ed. 72; *Texas & Pacific R. Co. v. Rigby*, 241 U. S. 33, 60 L. Ed. 874; *Northern Pacific R. Co. v. Washington*, 222 U. S. 370, 56 L. Ed. 237; *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. Ed. 1149; *Oregon-Washington R. & N. Co. v. Washington*, 270 U. S. 87, 70 L. Ed. 482; *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341, 71 L. Ed. 672; *C. & W. C. R. Co. v. Varnville F. Co.*, 237 U. S. 597, 59 L. Ed. 1137; *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314; *Prigg v. Pennsylvania*, 10 L. Ed. 1060; *Houston v. Moore*, 50 L. Ed. 19, as well as the cases heretofore cited.

In *Penn. R. R. Co. v. Public Service Com.*, 250 U. S. 566, this Supreme Court held that Congress had taken charge of all matters connected with the construction of cabooses and mail cars, and that the states were powerless to legislate. The logical result of this decision is that Congress has taken full jurisdiction of the matter of cabooses, including their construction, equipment, where they shall be placed in the trains, and whether they shall be placed at all on trains. The dissenting opinion of Mr. Justice Clark, l. c. 570, acknowledges this construction of the majority opinion.

The Supreme Court of Illinois in previous decisions had likewise sustained our position upon this point. *Staley v. I. C. R. R. Co.*, 268 Ill. 356; *People v. I. C. R. R. Co.*, 324 Ill. 591; *St. Louis C. R. Co. v. Blumberg*, 325 Ill. 387, and *Gamble-Robinson Co. v. U. P. R. Co.*, 262 Ill. 400.

The above statements as to the law were contained in our printed statement as to the jurisdiction of this Court. Appellees in their brief in support of their motion to dismiss or affirm concede the law to be as above set forth; they concede that if Congress had taken possession of the field, state legislation was invalid, even though it only

indirectly or incidentally burdens interstate commerce; they contend that if Congress had not taken possession of the field and the effect on interstate commerce was only indirect or incidental that then the state might pass and enforce proper police regulations, but that even then such regulations would be invalid if their enforcement directly affects or burdens interstate commerce. It therefore becomes important to determine whether or not Congress has taken possession of the field. If so, even under the decision of the Supreme Court of Illinois the order would be invalid.

In addition, as we have pointed out, the undisputed evidence shows that the furnishing of cabooses is a working condition; that it has always been considered as a working condition and what cabooses were to be furnished has been determined by contract between appellant and the Brotherhood representing its employes. We submit that under these circumstances Congress has taken jurisdiction of the furnishing of cabooses by the passage of the "Railway Labor Act," U. S. C. A., Title 45, Supp. 236 et seq. Sec. 1 (a) of this act (U. S. C. A., Sec. 151 a, Supp., p. 245) provides as follows:

> "The purposes of the chapter are: • • • (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of an agreement covering rates of pay, rules, or working conditions."

Sections 1 and 2 of Section 2 of the Act (Sec. 152, Title 45, Supp., p. 245) provides as follows:

> "First. **Duty of Carriers and Employees to Settle Disputes.** It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the appli-

cation of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

"Second. **Consideration of Disputes by Representatives.** All disputes between a carrier or carriers and its or their representatives shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Par. 6 of Sec. 2 of the Act [Sec. 152 (6), 45 U. S. C. A., Title 45, Supp., p. 246] provides as follows:

"Sixth. **Conference of Representatives; Time; Place; Private Agreements.**

"In case of dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; And provided further, that nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

Par. 7 of Sec. 2 of the Act [Sec. 152 (7), U. S. C. A., Title 45, Supp., p. 247] provides as follows:

"Seventh. **Change in Pay, Rules or Working Conditions Contrary to Agreement or to Section 156 Forbidden.**

"No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this chapter."

After providing the machinery for the establishment of adjustment boards and for the settlement of disputes taken under the statutes to such boards, the act provides in Sec. 3 (i) [Sec. 153 (i), U. S. C. A., Title 45, Supp., p. 260] as follows:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Sec. 5 of the Act (Sec. 155, U. S. C. A., Title 45, Supp., p. 268) provides as follows:

"First. **Disputes Within Jurisdiction of Mediation Board.**

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused."

The existing contract between appellant and the Brotherhood (R. 82) contains the following provisions:

Article 22—"(a) Yardmen will be furnished cabooses properly equipped for through long service.

(b) Cabooses will be furnished during all periods of the year to crews on the Central Belt, Falling Springs Branch, Cotton Belt Florida Street merchandise run, and on through trains between Madison Yard and Dupo. Cabooses will be furnished other crews now enjoying them between October 15th and May 1st of each year."

Under these rules it is provided that they "will remain in effect until thirty days' notice shall have been given by either party requesting a change." Consequently, the furnishing of cabooses involves a working condition. Congress has prescribed the way in which such working condition shall be changed. A valid contract is in force and effect as to the furnishing of these cabooses, made between appellant and the Brotherhood, which is an appellee here. Recourse is open to appellee, the Brotherhood, at any time, subject to the provisions of the amended Railway Labor Act for the determination of any changes that should be made in this working condition.

M. P. R. R. Co. v. Norwood, 283 U. S. 249, 252, 253, 256, has been heretofore cited in opposition to our contention that the Railway Labor Act has taken control of the matter of settlement of disputes as to working conditions between a railroad and its employes. This case involved the Arkansas full-crew law. All that this Court held in the Norwood case was that the fact that the Railway Labor Act authorized regulation in respect to the practice of the

carrier in supplying trains to be provided by the carrier did not include the regulation of the number of brakemen or helpers. The decision construed only that language and does not in any way assert that Congress has not given full jurisdiction to the National Railway Labor Board to settle disputes as to working conditions; in fact, the Norwood case supports our contention because it holds that Congress has taken jurisdiction in regard to supplying trains. All that it does hold is that by taking jurisdiction of that matter and placing such jurisdiction in the Labor Board, Congress did not include the number of brakemen or helpers to be furnished.

Sec. 1, Par. (10), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 101), defines car service as follows:

> "(10) 'Car service' defined. The term 'car service' in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter."

Sec. 1, Par. (11), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 102), provides as follows:

> "Sec. 1, Par. (11) Duty to furnish car service; rules and regulations. It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Sec. 1, Par. (12), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 109), takes jurisdiction of the destination of coal cars.

Sec. 1, Par. (13), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 115), provides as follows:

"Sec. 1, Par. (13). Rules and regulations as to car service to be filed, etc. The commission is authorized by general or special orders to require all carriers by railroad subject to this chapter, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this chapter relating thereto."

Sec. 1, Par. (14), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 115), provides as follows:

"Sec. 1, Par. (14). Establishment by commission of rules, etc., as to car service. The commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this chapter, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices."

Sec. 1, Par. (15), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 116), provides as follows:

"Sec. 1, Par. (15). Powers of commission in case of emergency. Whenever the commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if so ordered, without answer or other formal pleading by

the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend or annul them. In time of war or threatened war, the President may certify to the commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the commission shall, under the power herein conferred, direct that such preference or priority be afforded."

Sec. 1, Par. (16), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 119), permits the Commission to authorize the rerouting of traffic on failure of the initial carrier to serve the public.

Sec. 1, Par. (17), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 120), provides as follows:

"Sec. 1, Par. (17). Directions of Commission as to car service; disobedience; rights of State. The directions of the commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and by such agents or agencies as the commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this chapter, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction, such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: Provided, however, That nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business; except in so far as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter."

Sec. 1, Par. (21), of the Interstate Commerce Act (U. S. C. A., Title 49, p. 132), in part provides as follows:

"Sec. 1, Par. (21). Power of commission to require adequate facilities or extension of line; penalty. The commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car

service as that term is used in this chapter, and to extend its line or lines."

Sec. 26 of the Interstate Commerce Act (U. S. C. A., Title 49, p. 306), in part provides as follows:

> "Sec. 26. Installation of safety devices directed; negligence; penalty. The Commission may, after investigation, order any carrier by railroad subject to this chapter, within a time specified in the order, to install automatic train-stop or train-control devices or other safety devices, which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad, such order to be issued and published at least two years before the date specified for its fulfillment."

Sec. 439 of the Transportation Act was inserted in the Interstate Commerce Act as Section 20a (U. S. C. A., Title 49, p. 132), subjecting to the approval of the Interstate Commerce Commission all issues of securities or other evidences of indebtedness or requisites to be found before an approving order can be issued. It is stated in paragraph 2 of the section:

> "The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

This section has been construed by this Court in *Dayton-Goose Creek Ry. Co. v. U. S.*, 263 U. S. 456, 478, and the effect of the enactment was further discussed by this Court in *R. R. Comm. v. Southern Pacific Ry. Co.*, 264 U. S. 331. Furthermore, Congress has taken jurisdiction

of such matters by reason of the passage of the Boiler Inspection Act, 45 U. S. C. A., p. 78, Sec. 22 et seq., and by the Power Brake and other provisions of the Safety Appliance Act, 45 U. S. C. A., Sec. 1 et seq., p. 3 et seq.

As we have pointed out, this Court, in *Penn. R. R. Co. v. Public Service Comm.*, 250 U. S. 566, held that Congress had taken charge of all matters connected with the construction of cabooses and mail cars. On page 569 of the opinion, Mr. Justice Holmes said:

> "The Safety Appliance Act with its careful requirements for the safety of the men was followed by most elaborate regulations issued by the Interstate Commerce Commission which include three large pages of prescriptions for 'caboose cars without platforms.' Caboose cars are constantly used as end cars and these pages, like the Post Office order as to mail cars, recognize the lawfulness of an end car such as the Pennsylvania statute forbids.
>
> "The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case. The subject matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here. The Interstate Commerce Commission is continually on the alert, and if the Pennsylvania law represents a real necessity, no doubt will take or recommend steps to meet the need."

We again call attention to the fact that in Mr. Justice Clark's dissenting opinion, l. c. 570, he held that under the majority opinion it has been held that Congress had taken full jurisdiction of the matter of cabooses, including their construction, equipment, where they shall be placed in trains and whether they shall be placed at all in trains.

While not authoritative here, we call the Court's attention to the very persuasive language of the three-judge court in *A. T. & S. F. Ry. Co. v. La Prade*, 2 Fed. Supp. 855. That case involved the Arizona train limit law, and in a well-considered opinion the court pointed out that by reason of the statutes above cited, with the exception of the Railway Labor Act, which was not mentioned, Congress had taken jurisdiction of the subject matter. The same point was made in *Southern Pac. R. Co. v. R. R. Comm. of Cal.*, 10 Fed. Supp. 918, as to cabooses, but the Court held, l. c. 925, that in view of other holdings in the case it was unnecessary to discuss this point, although two of the members of the court in the *Southern Pacific* case were members of the three-judge court which had already passed on that point in the La Prade case.

It is, therefore, respectfully submitted that by reason of the foregoing legislation, Congress has taken jurisdiction of the field. Consequently, the order of the Illinois Commerce Commission is invalid, whether the effect of its enforcement would be direct or indirect or incidental so far as interstate commerce is concerned. If Congress has taken jurisdiction of the field, then there can be no question but what this order is invalid and repugnant to the Constitution and laws of the United States. The Supreme Court of Illinois recognized this rule, but held that Congress had not taken jurisdiction of the field and that the effect on interstate commerce was not direct but was only indirect and incidental and, therefore, within the police power of the State. The Supreme Court of Illinois was wrong in its decision on this question.

Counsel have heretofore cited the case of *Missouri Pacific R. R. Co. v. Norwood*, 283 U. S. 249, as an authority for their contention that by the provisions of the Interstate Commerce Act, above set forth, Congress has not taken charge of the field, and quote from pages 256 to 258 of the opinion in support of their contention. The language used

in the quotation not only does not support appellees' position, but it supports our position. The opinion clearly shows that this Court did hold that by these provisions of the Interstate Commerce Act Congress had taken possession of the field relative to "supply of trains." All that this Court held was that the fact that Congress had taken charge of the field of the "supply of trains" did not take possession of the field concerning how many men should be employed on a train. In other words, the opinion shows that Congress had taken charge of the field so far as supply of trains is concerned. The number of men that operate these trains is immaterial to the supply of trains, and this opinion supports our position that Congress, by reason of the provisions of the Interstate Commerce Act, has taken charge of the field as to the supply and equipment of trains and whether or not a caboose should be attached to runs of this character.

The definitions of "common carriers," "railroad" and "transportation," as contained in paragraph 3 of Section 1 of the Interstate Commerce Act, U. S. C. A., Sup., Title 49, p. 6, clearly sustain our contention. A "railroad" by that section is defined, among other things, as including all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated, including all freight depots, yards and grounds used or necessary in the transportation or delivery of any such property. The term "transportation" is defined as including locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage.

It is immaterial whether the Interstate Commerce Commission has issued regulations as to when cabooses should be used, i. e., "adequate and safe car service," for Congress has taken possession of the entire field and placed the administration of it in the Commission. If a state cannot say what safety provisions shall be made, as held

in the Pennsylvania case, supra, then it cannot require a particular type of car to be placed on the ends of trains, nor can it require any caboose to be used on any interstate runs.

The late cases of *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 86 L. Ed. 322, and *Clover Leaf Butter Co. v. Patterson*, 86 L. Ed 486, also sustain our position on this point.

The Los Angeles depot case, viz., *R. R. Com. v. Southern Pacific;* 264 U. S. 331, does not militate against our position, but, on the contrary, supports our contentions.

Northwestern Bell Telephone Co. v. Nebraska, 297 U. S. 471, merely sustained the right of Nebraska to require telephone companies to use a depreciation rate fixed by the State Commission for the purpose of determining values as to intrastate rates. This Court merely construed the wording of the particular statute involved and held that it did not restrict control until the Interstate Commerce Commission had acted. Furthermore, the part of the opinion quoted applies solely to the use of such a depreciation factor for the determination of rates for intrastate telephone service, and there was no attempt to require such depreciation rate to be used in determining rates for interstate telephone service.

Kelly v. Washington, 302 U. S. 1, limits the right of the states to deal with local exigencies where such conditions exist in the absence of conflict with federal legislation. Neither does this case militate against our contention that if Congress occupies the field, state legislation is prohibited. All that it does hold is that under certain circumstances Congress may by its acts limit the field upon which the legislation operates.

The same answer may be made to the cases of *Eichholz v. Public Service Com. of Mo.*, 306 U. S. 268, and *Welch v. N. H.*, 306 U. S. 79.

We have taken the liberty of discussing these cases in our original brief for the reason that appellees in their motion to dismiss or affirm have cited them as authority for their position.

The Order Does Directly Burden and Affect Interstate Commerce, and Does Have Extraterritorial Effect and Is Therefore Invalid, Even Though Congress Has Not Taken Charge of the Field.

Under this heading we shall discuss the question of whether or not the order directly burdened and affected interstate commerce and has an extraterritorial effect.

Again we call the Court's attention to the two parts of this order, one covered by Finding 34 of the Commission, relative to the inter-yard runs in Illinois, containing 98% of interstate freight, and the other runs covered by Finding 35, which relates to the bridge runs over the Eads and Merchants Bridges between Illinois and Missouri, and which obviously were 100% interstate in character.

The burden on interstate commerce, so far as the inter-yard runs in Illinois are concerned, consists of the delays and added expense in the moving of this interstate traffic which we have detailed in our statement. These same burdens exist as to the bridge runs, with the addition that as we have pointed out the practical observance of the order as to the bridge runs requires cabooses to be attached to the runs in Missouri for a distance of several miles, both in going from Illinois to Missouri and in coming from Missouri to Illinois. These facts are undisputed and are recognized and found by the Supreme Court of Illinois in its opinion.

We conceive it to be the law, and the Supreme Court of Illinois so recognized the fact, that if a state enactment imposes a direct burden on interstate commerce it must fall regardless of whether or not Congress has legislated on the subject. The Supreme Court of Illinois recognized this

rule of law, but it held that Congress had not legislated on the subject and that the burdens and effects on interstate commerce by reason of the enforcement of the order would only be indirect and incidental and not directly burden and affect the same. The point of our objection, and it is sustained by many decisions of this Court, is that the state, by this order, has directly restricted that which in the absence of federal regulation should be free. In other words, if Congress has taken possession of the field, the state cannot regulate at all, but even if Congress has not taken possession of the field, a state cannot legislate if its enactment imposes a direct burden on interstate commerce.

Minnesota Rate Cases, 230 U. S. 352-396;
Lemke v. Farmers' Grain Co., 258 U. S. 50;
Shafer v. Farmers' Grain Co., 268 U. S. 189;
Buck v. Kuykendall, 267 U. S. 307;
C. B. & Q. R. Co. v. R. R. Com., 237 U. S. 220;
K. C. Ry. Co. v. Kaw Valley Drainage Dist., 233 U. S. 75;
U. S. v. Southern Ry. Co., 222 U. S. 20;
Southern Ry. Co. v. R. R. Com. of Ind., 236 U. S. 439;
South Covington & Cincinnati Ry. Co. v. Covington, 235 U. S. 537.

We, of course, do not concede that Congress has not occupied the field—in fact, we strenuously contend that it has. But assuming for the purpose of the argument that Congress has not taken charge of the field, yet we contend that this order does directly burden and affect interstate commerce, and does as a practical proposition as to the bridge runs have an extraterritorial effect, and, therefore, is void, whether Congress has taken possession of the field or not.

In connection with the question of the modern trend of authority concerning the commerce clause of the Constitution, the present state of the law on that subject, and

the distinction between direct and indirect affect on interstate commerce, we call attention to two decisions of this Court under date of November 9, 1942, and not yet officially reported. These cases are: *Wickard, Secretary of Agriculture, etc., v. Filburn*, No. 59, October Term, 1942, reported in 11 L. W. 4011, and *Warren-Bradshaw Drilling Co. v. O. V. Hall etc.*, No. 21, October Term, 1942, and reported in 11 L. W. 4015.

In the *Wickard* case this Court sustained the Agricultural Adjustment Act to apply to wheat not grown for sale, but intended for use or consumption upon the farm on which it was raised, and held such construction to be valid under the commerce clause of the Constitution. The Court in this opinion demonstrated the change in the trend of authority after *United States v. Knight*, 156 U. S. 1, beginning with *Swift & Co. v. United States*, 196 U. S. 375, 398, and continuing in such cases as the *Shreveport Rate Cases*, 234 U. S. 342, and *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 119, and quoted from the last-named case as follows:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of power over it, as to make regulation of them appropriate means to the ascertainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."

Furthermore, in the *Wickard* case, supra, the Court quoted from its decision in *Santa Cruz Co. v. Labor Board*, 303 U. S. 453, 466-467, where Mr. Chief Justice Hughes, speaking for the Court, said:

> "'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.'"

In the *Wickard* case, supra, this Court said:

> "In some cases sustaining the exercise of federal power over intrastate matters the term 'direct' was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with 'substantial' or 'material'; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause."

Under this definition it seems clear that the order complained of in the instant case must be held directly to burden and affect interstate commerce.

In the *Warren-Bradshaw Drilling Co.* case, supra, this Court held that the Federal Wage and Hour Law applies, and with such application was valid, to the members of a drilling crew drilling oil wells, whose employer's contracts with the owners of oil lands part of whose oil will ultimately find its way into interstate commerce, even though the flow in such commerce had not at the time started.

Under these decisions the order here must be held directly to interfere with, hinder and affect interstate commerce, and this is equally true as to the bridge runs con-

taining 100 per cent interstate freight as to the inter-yard runs containing 98 per cent interstate freight. As to all these runs the delay and expense equally result, and as to the bridge runs there is the additional burden and effect as a practical railroading proposition of compelling compliance in Missouri where the Commission is without legal power or authority to legislate.

The leading case in support of our contention is the decision of this Court in *South Covington & Cincinnati St. Ry. Co. v. Covington*, 235 U. S. 537; and this case is on all fours with our case. In that case the City of Covington, Kentucky, passed an ordinance which provided, among other things, that passengers could not ride on the rear platform of street cars, except under certain conditions, nor upon the front platform of street cars unless certain conditions were complied with, and requiring the street car company to keep the cars clean, ventilated and fumigated. The ordinance also had provisions relative to the number of passengers to be carried on a car and the number of cars to be provided, and certain requirements as to the heating of the street cars. The railway company operated a street car line from Covington, Kentucky, across the Ohio River to Cincinnati, Ohio. This Court sustained the provisions relative to passengers riding on the rear and front platforms unless suitable barriers or rails were provided and the requirement to keep the cars clean, ventilated and fumigated, because those provisions of the ordinance could be complied with in Covington without necessarily being complied with in Cincinnati. This Court, however, held invalid that part of the ordinance relative to the number of passengers to be carried on a car and the number of cars to be provided, because such provisions of the ordinance were a burden upon interstate commerce for the reason that, inasmuch as the cars went across the river to Cincinnati, the City of Covington was endeavoring to make regulations which, if enforced in Covington, as a practical proposition,

would necessarily have to be carried out in Cincinnati, a place where the City of Covington had no jurisdiction. This Court did not base its decision upon the question of whether or not federal laws had superseded state laws, but upon the fact that Covington, Kentucky, could not pass an ordinance as to the number of cars to be run across the bridge on the line of the street railway company, or as to the number of passengers to be carried on each car, where such regulation would, as a practical proposition, require the same number and kind of cars to be run or the same maximum number of passengers to be carried on each car, in another state, where the City of Covington had no jurisdiction. On page 545 of the opinion the Court said:

> "This court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between states, the mere arrangements of billing or plurality of carriers do not enter into the conclusion. Here is an uninterrupted transportation of passengers between states, on the same cars, and under practically the same management, and for a single fare. We have no doubt that this course of business constitutes interstate commerce. Texas & New Orleans R. R. v. Sabine Tram Co., 227 U. S. 111; St. Louis, S. F. & T. R. R. v. Seale, 229 U. S. 156; Railroad Commission of Ohio v. Worthington, 225 U. S. 101; Omaha & Council Bluffs Street Ry. v. Interstate Commerce Commission, 230 U. S. 324, 336. A contrary conclusion was reached in this case by the Kentucky Court of Appeals upon the authority of Missouri Pacific R. R. v. Kansas, 216 U. S. 262, but that case concerns an order under authority of the State of Kansas, requiring the running of a passenger train wholly within the state. It was pointed out in the course of the opinion that the order did not deal with an interstate train or put a burden upon such train, but simply required the operation within the state of a local train, the duty of operating such train arising from the charter obligation of the company."

After holding as above stated, this Court then divided the ordinance into two parts, as above mentioned, and held valid that part that could be enforced wholly in Covington, without necessarily being enforced in Cincinnati, but held invalid that part as to the number and kind of cars and the number of passengers to be carried which could not be enforced in Covington without also being enforced in Cincinnati. On pages 547 and 548 of the opinion the Court said:

> "We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply."

Furthermore, the Court held that the ordinance requirement as to minimum temperature to be maintained was unreasonable and void for the reason that the evidence showed it to be impossible and impractical in actual operation.

This makes the Covington case an absolute authority in the present case. The undisputed evidence in the present case shows that if cabooses are required on these interstate bridge runs in Illinois, the appellee will necessarily have to have cabooses for great distances in Missouri. In other words, cabooses cannot be furnished to the state line and then taken off, but as a practical proposition, which this Court said was the test in such matters, the full effect of finding 35 is to require cabooses to be put on in the yards in Missouri and carried a consid-

erable distance in Missouri in order to be on the trains when entering Illinois at the state line; and it further requires cabooses to be carried in Missouri after the state line is passed for a considerable distance to the yard in Missouri before they can be detached from the train. These facts are undisputed and are shown conclusively not only by appellee's witnesses, but also by the testimony of Mr. Thomas, the chief inspector of the Commission, who was called as a Commission witness.

We respectfully submit that the Covington case absolutely disposes of this case and it was on the authority of this case and other cases that Commissioner Olson dissented from the order and decision of the Commission.

In its opinion (R. 246) the Supreme Court of Illinois seemed to think that this Court held certain portions of the ordinance invalid because of certain franchise provisions of the Street Railway Company in Cincinnati. All that this Court held was (l. c. 547) that this was one of the facts to be considered, as appears from the following short quotation from the opinion:

> "To comply with these regulations, the testimony shows, would require about one-half more than the present number of cars operated by the Company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges, held by the Company, or controlled by it, in that City. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation of the cars of this Company, are to be taken into view in determining the nature of the regulation here attempted, and whether it so directly burdens interstate commerce as to be beyond the power of the State."

Counsel have sought, however, to assert that the Covington case supports their theory, because they say this Court sustained the ordinance provision for barriers or rails on

the rear platform of the car. They misquote the ordinance, as shown by their own quotation from the opinion of this Court. The ordinance provided that no passenger could ride on the rear platform unless it was provided with a suitable rail or barrier. This Court sustained this provision of the ordinance. It did not require a rail or barrier, but only prohibited passengers on the rear platform unless rails or barriers were provided. This could be enforced in Covington and need not be enforced in Cincinnati. When there was no rail or barrier passengers could not ride on the rear platform in Covington, but they could do so when the state line was reached.

On this point we again call the Court's attention to the persuasive language used by the three-judge court in the case of *A. T. & S. F. Ry. Co. v. La Prade*, 2 Fed. Supp. 855, involving the train limit law of Arizona, and to the language appearing on page 859 of the opinion, where the Covington case, supra, is quoted as authority for the opinion of the court.

Southern Pac. R. R. Co. v. R. R. Comm. of Cal. et al. (Brotherhood of Railroad Trainmen et al., Intervenors), reported in 10 Fed. Supp. 918, is another case in point. We realize that this case is not an authority in this Court, but the conditions are so similar and the opinion of the three-judge court so persuasive that we cite it here in support of our position. In that case the California Commission entered an order that the railroad company, between October 1st and March 31st, equip all freight trains in excess of 57 cars, exclusive of rear caboose, operating in both easterly and westerly directions, on that part of its line between Roseville, California, and the California-Nevada state line, with an additional caboose to be placed approximately midway between the rear caboose and the leading engine of the train, and requiring that the railroad company so modify its rules in respect to the duties of trainmen as to permit of the reasonable

and necessary use of caboose cars by members of the train crew. The railroad company, l. c. 919, alleged that the order of the California Commission interfered with and placed an undue burden upon interstate commerce, and therefore violated the commerce clause of the Constitution. The Commission defended its order on the ground that it was a police regulation in the interest of public health and safety, and also contended that the order was not directed at interstate commerce and had no extra-territorial effect because it was limited to the State of California and on its face its provisions became ineffective at the state line between the two states. In order to comply with the order, the railroad would be compelled to build switches at the state line costing $6,700.00, and to delay its trains approximately 30 minutes in order to take off or attach the caboose, as the case might be. The California Commission recognized this fact, but said that such cost and delays could be eliminated by the company carrying the extra caboose about 17 miles to its switch at the division point at Sparks, Nevada, when leaving California, and attaching its caboose at Sparks when the train was entering California. In other words, the Court held that inasmuch as the railroad would be required to acquire at least 15 new caboose cars at a cost of not less than $46,500.00, and that the cost of operations would delay and add to the expense of handling, that therefore the conclusion was inescapable that compliance with the order would necessitate delay and interference with the continuous movement of interstate freight trains. The Court further held that the burden imposed was a direct and substantial burden on interstate commerce and amounted to a direct interference therewith, and that the order was in contravention of the commerce clause of the Constitution.

Other cases supporting our position are: *Lemke v. Farmers' Grain Co.*, 258 U. S. 50; *Shafer v. Farmers'*

Grain Co., 268 U. S. 189; *C. B. & Q. R. R. Co. v. R. R. Comm.*, 237 U. S. 220, and *Colorado v. U. S.*, 271 U. S. 153.

Counsel have cited the case of *C. R. I. & P. R. R. v. Arkansas*, 219 U. S. 453, where this Court sustained the constitutionality of the Arkansas Full Crew Law. Commissioner Olson (Tr. 2-19) in his dissenting opinion conclusively answered the argument of appellees relative to the effect of that case. The law was held constitutional because it operated solely within the boundaries of Arkansas and could be enforced in that state without necessarily being enforced in another state. This Court did not hold that, where as a practical proposition an order or statute, in order to be enforced in Illinois required it also to be followed in another state, then the statute or order would be constitutional. The other cases cited herein clearly answer this argument of appellees and sustain our contention and the position of Commissioner Olson that inasmuch as this order as to the bridge runs cannot be enforced in Illinois without necessarily applying to operations in Missouri, it cannot be sustained. It is obvious in the Arkansas case that when the state line was reached the extra member of the crew could cease work, and that no full crew legislation could require the extra member of the crew to be used in another state where no applicable legislation to that effect existed.

Atlantic Coast Line R. Co. v. Ga., 234 U. S. 290, has also been cited. The statute involved in that case required engines in Georgia to be equipped with electric headlights. The headlights could be operated in the state. It was a statute that could be enforced solely in Georgia without necessarily being applicable in other states, and consequently this Court held it constitutional. Both this case and the Arkansas Full Crew cases (decided in 1911 and 1913 prior to extension of the Interstate Commerce Act and other federal legislation) were decided before the decision of this Court in *South Covington & Cincinnati*

Street Ry. Co. v. Covington, 235 U. S. 537, which latter case is on all fours with our case. If the Atlantic Coast Line case conflicts with the decision in the Covington case, supra, the latter case is not only later, but is based upon a state of facts very similar to the facts in the case at bar; in fact, this Court in the Covington case, supra, quoted the Atlantic Coast Line case, supra, as authority for its holding that the provisions of the Covington ordinance held constitutional only incidentally regulated interstate commerce.

The same answer can be made to the case of *Whitney v. Johnson*, 37 F. Supp. 65, affirmed by this Court in a per curiam opinion in 314 U. S. 574.

Appellees have also cited the recent case of *California v. Thompson*, 313 U. S. 109. This case involved the constitutionality of a California statute requiring every transportation agent for motor vehicles over the state highways to procure a license from the State Railroad Commission, pay a license fee and file a bond. These transportation agents negotiated for the sale of transportation over the public highways of the state. All that this Court held in that case was that, in the absence of pertinent regulation by Congress, the statute requiring a transportation agent to procure a license, pay a fee and file a bond does not violate the commerce clause when applied to one who negotiates for transportation interstate of passengers over state highways where the license is not conditioned on any control or restriction of movement of traffic interstate, but is conditioned only on the good character and responsibility of those engaged locally as transportation brokers. The Court sustained the legislation on the ground that (a) it was not a revenue measure, (b) it did not operate to increase the cost of transportation and (c) its purpose was only to prevent fraud on the public.

There is nothing in the case of *Duckworth v. Arkansas*, 314 U. S. 390, to militate against our contention here. It,

in fact, sustains the power of the state in the regulation of the liquor traffic under the Twenty-first Amendment. We call particular attention to the concurring opinion of Mr. Justice Jackson as pertinent to the facts in this case.

But counsel for appellees say that the requirement of furnishing a caboose for the protection of switchmen has no more direct effect upon interstate commerce than the requirement of the Arkansas Full Crew Law and the requirement of the Georgia Electric Headlight Law. It is obvious that this argument cannot be sustained. Neither the Arkansas nor the Georgia statute required any compliance in any other state. Each of these laws could be enforced in the respective states enacting them without necessarily being enforced as a practical proposition in any other state. The extra member of the crew could be relieved of work the moment the state line was reached as he was leaving the state and could be put to work only when the state line was reached in entering the state. The electric headlight could be used in Georgia and turned on or off, as the case might be, exactly on the state line without delaying or impeding through traffic. The practical operation of neither of these statutes required compliance in any other state. We respectfully call the Court's attention to the cases we have cited in our statement as to jurisdiction upon these points.

The same answer can be and is made to the New York electric headlight statute, held constitutional by this Court in *N. Y. N. H. & H. R. Co. v. New York*, 165 U. S. 628.

Counsel also cite the case of *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262. In that case the order of the State Commission directed the operation of a passenger train between Madison, Kansas, and the state line. This decision was not only before the decision of this Court in the Covington case, supra, but it merely sustained the right of Kansas to require the operation of an intrastate train

within the state, where the duty to operate arose from a charter obligation, and, furthermore, the matter of operation beyond the state line was held to be merely a matter of election on the part of the railroad company and not to be required as a matter of practical operation of the railroad. The order dealt with a **local**, not interstate, train designated to make connections with other railroads within the state.

In distinguishing this case from the Covington this Court so held (p. 545).

It is therefore respectfully submitted that under the decisions herein cited and the facts in this case, the order of the Illinois Commission does directly burden, affect and interfere with interstate commerce and is consequently invalid, even though it may be held that Congress has not legislated on the subject and has not taken charge of the field. This argument applies to both the interyard runs and the bridge runs. As to the interyard runs, the burden and interference consist of the delays and added expense in interstate commerce. As to the bridge runs, this same expense and delay exists, but, in addition thereto, the enforcement of the order as a practical railroading proposition requires the furnishing of cabooses in Missouri, where the Illinois Commission has no jurisdiction. But the Supreme Court of Illinois in its opinion lays great stress upon the fact that the order on its face is limited to the confines of the State of Illinois and does not purport to regulate interstate commerce, and that the effect of the order must be determined by what it purports to do and not from what actually results. Such a conclusion is contrary to the rules of law laid down in *South Covington Ry. Co. v. Covington*, 235 U. S. 537; l. c. 545; *Southern Pac. R. R. Co. v. R. R. Commission*, 10 F. Supp. 918; *A. T. & S. F. Ry. Co. v. La Prade*, 2 F. Supp. 855; *Lemke v. Farmers' Grain Co.*, 258 U. S. 50, and *Shafer v. Farmers' Grain Co.*, 268 U. S. 189. It is also contrary to the decision in *People v. Cross*, 361 Ill. 405.

The Order Deprives Appellant of Its Property Without Due Process of Law.

It is further submitted, and the Supreme Court of Illinois held otherwise, that the benefits accruing by putting this order in effect are so disproportionate to the expense involved, and the cost so exorbitant compared to the benefits, that it constitutes a deprivation of appellant's property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States. In support of our position in this respect, we cite: *Colorado v. U. S.*, 271 U. S. 153; *Panhandle Eastern Pipe Line Co. v. State Highway Com.*, 294 U. S. 613; *Penn. Coal Co. v. Mahon*, 260 U. S. 393, to the effect that "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"; *Great Northern R. R. Co. v. Minnesota*, 238 U. S. 340, to the effect that any act requiring the expenditure of money upon the part of a railroad company involves the taking of its property, and the question whether this is done with or without due process of law depends upon the special circumstances. We further cited *State of Washington ex rel. Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, and *C. B. & Q. R. R. Co. v. Commerce Com.*, 364 Ill. 213.

The following cases, among many, also support the above rules:

Southern Railway Co. v. Virginia, 290 U. S. 190, 78 L. Ed. 260;

Georgia Power Co. v. Decatur, 281 U. S. 505, 74 L. Ed. 999;

Norfolk & W. Railroad Co. v. P. S. C., 265 U. S. 70, 68 L. Ed. 904;

Chesapeake & Ohio Ry. Co. v. P. S. C., 242 U. S. 603, 61 L. Ed. 520;

Miss. R. R. Com. v. M. & O. R. Co., 244 U. S. 388, 61 L. Ed. 1216;
C. M. & St. P. R. R. v. Wisconsin, 238 U. S. 491, 59 L. Ed. 1423;
C. B. & Q. Ry. v. Wisconsin R. R. Com., 237 U. S. 220, 59 L. Ed. 926;
Mo. Pac. Ry. Co. v. Kansas, 216 U. S. 262, 54 L. Ed. 472;
Atlantic Coast Line v. N. Car. Corp. Com., 206 U. S. 1, 51 L. Ed. 933;
Chicago & N. W. Ry. v. Ochs, 249 U. S. 416, 63 L. Ed. 679;
Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. Ed. 194;
C. B. & Q. Ry. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979.

We have further pointed out the effect of the persuasive language of the three-judge court in *Southern Pac. R. R. Co. v. R. R. Comm. of Cal.* (B. of R. T. et al., Intervenors), reported in 10 Fed. Supp. 918, which language is also applicable to this point, because in that case it was held that the small expenditure of $6,700.00 in order to comply with the order of the Commission would deprive the railroad of its property without due process of law if it should incur that expense rather than take the choice of carrying out the order in Nevada, where the California Commission had no jurisdiction. The facts on this question have been clearly set forth in our statement of the case. Whether the delay be eleven minutes or forty minutes per run, the limits fixed by the Supreme Court of Illinois, or whether the cost of supplying new cabooses be $44,000.00 or $250,000.00, and whether the annual expense under normal conditions, to say nothing of present conditions, would be $62,000.00 or $150,000.00, is immaterial in this case.

We have also conclusively shown the very small benefit accruing to one member of each crew by reason of furnish-

ing cabooses, which he would only use from one-sixth to one-eighth of his working time; and the other uses to which the cabooses could be put are fully covered by other facilities furnished by appellant.

We respectfully submit that the expense and delay incident to appellant in order to comply with this order is so exorbitant and unreasonable when compared with the benefit accruing therefrom, and said benefits to this one member of the crew are so disproportionate to the cost thereof to appellant, that to enforce this order would deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Of course, there are some hazards when trains are operated without cabooses that do not exist when cabooses are furnished, to the same effect that there are more hazards in operating a train than in not operating it. On this point we again call attention to the undisputed evidence in the record (R. 228) that, even with the bridge runs included, for a long time injuries to employees on the rear end of a train have been far less when no caboose was provided than when one was furnished. This record shows such a slight benefit to the one employee on each run in proportion to the expense involved and delay incident to interstate commerce by reason thereof that it violates the due process of law provisions of the Fourteenth Amendment. This point applies equally to the inter-yard runs and the bridge runs; in fact, under the order of the Commission the expense and delays involve trains in the aggregate for both of the two kinds of runs involved because the order itself requires cabooses on all the runs, and the enforcement of the order of the Commission would require an aggregate expense and delays necessary to comply with the entire order.

CONCLUSION.

As we have pointed out heretofore in this brief, under the Illinois practice the order must be good in all respects or it must be reversed. If we are right on any one of the propositions that we have advanced, then the Illinois practice requires a reversal in this case, because if this Court should hold that we are right on any one proposition and reverse the judgment of the Supreme Court of Illinois on that proposition, then under the Illinois cases previously cited a remandment of the cause to the Supreme Court of Illinois could do nothing except to affirm the decision of the Circuit Court of St. Clair County.

We respectfully submit this case to the Court and ask that the order and judgment of this Court be that the judgment and order of the Supreme Court of the State of Illinois be reversed and the cause remanded to that Court, with directions that it enter such orders as may be consistent with such opinion as this Court may hand down in this case.

All of which is respectfully asked and prayed.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No. 218.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative, and ILLINOIS COMMERCE COMMISSION.

Appeal from the Supreme Court of the State of Illinois.

REPLY BRIEF FOR APPELLANT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No. 218.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative, and ILLINOIS COMMERCE COMMISSION.

Appeal from the Supreme Court of the State of Illinois.

REPLY BRIEF FOR APPELLANT.

Counsel for appellees have filed a brief in this cause. It is our purpose to file a short reply brief in answer to it.

ANSWER TO APPELLEES' ADDITION TO STATEMENT.

Appellees have seen fit to make a complete restatement of the case, although in most instances they concede our statement to be correct. The main additions to the statement consist of a defense on the merits of the Commission's order, and an attempt to point out certain alleged misstatements in our statement.

We concede that in our brief we were confined to the purely federal questions involved. Before the Commission and in the state court we raised many matters not involving federal questions that are not properly cognizable here. While we did not agree with the findings of the Illinois Supreme Court on these points, we thoroughly appreciate that they have been conclusively determined against us by the State Supreme Court, and that we are confined in this court to the one point, that the decision and order drawn in question in this case is repugnant to the Constitution and laws of the United States.

In their statement counsel have grossly exaggerated the use and need of cabooses. We realize that there are some hazards that exist without a caboose that do not exist with one. However, as we pointed out in our brief (pp. 14, 15), the distances between yards are not great; none of the crew would use a caboose except the rear switchman (see Finding 20, R. p. 9), and he would use it only between yards; that the running time between yards was from eleven to thirty minutes, and that the balance of the time the caboose would not be used by any member of the crew; and that under these circumstances we computed that the caboose would only be used from one-sixth to one-eighth of the time by the one switchman during each eight-hour period of work. Furthermore, the rear switchman does no clerical work, but that is done by the foreman, who rides the front end of the cut. We also pointed out that on the longer runs cabooses are furnished; that the rear switchman has no equipment except a lantern by night and a flag by day, which he constantly uses, and therefore needs no place to store them. We also showed that the men report for and quit work at the same place, and that there are sixteen service stations in the three yards in Illinois, located at various places in the yards, and providing ample facilities for the storage of street clothes, lunches, etc., and that there is a seat box in the engine for that purpose.

It is also urged by appellees that this order is for the benefit of the public. The answer to this contention is two fold: First, all of the duties that a switchman would perform, so far as the public is concerned, would be performed when not in a caboose, and, secondly, the findings of the Commission (R. 8 to 12) conclusively show that this order is based solely upon the alleged hazards and perils to switchmen, and that the Commission did not enter the order based on any findings as to the safety or convenience of the public. Under the Illinois law, an order of the Commission must and can only be based on findings contained in the order. Lowden v. Illinois Commerce Commission, 376 Ill. 225, l. c. 230-231.

We also showed in our brief (p. 15) that in nine years only sixteen accidents had happened to switchmen riding on the rear end of trains, and that, of these, eight accidents happened while the employees were actually riding in cabooses, one while riding on the rear end, viz., on the drawbar, and seven while riding on cars.

While it is true that some of the lines, as does appellant, around St. Louis use cabooses on certain runs, we conclusively showed that very few of the lines around St. Louis use cabooses in deliveries to appellant.

Appellees on page 7 of their brief contradict our statement that the record shows conclusively and without contradiction that it would be impractical railroading to cut off or couple a caboose on the bridges at the middle of the river. We did not say it would be impossible to do this, but we did say that, as a practical railroading matter, it would be impossible to cut off and couple cabooses on the bridges at the state line at the middle of the river.

It is true that it might be possible to build crossovers and leave the cabooses on one of the two main tracks at or near the middle of the river, but as we conclusively showed, this could not be done as a practical railroading proposition.

We again respectfully call the Court's attention to our discussion of this question on pages 7, 8 and 9 of our original brief, and particularly to the testimony of the chief railway inspector of the Commission (R. 99), who stated that as a practical proposition to put cabooses on the runs across the river would require them to be hauled on over to St. Louis on runs from Illinois and put on the trains on the runs in Missouri to bring them into Illinois, and that if a caboose was taken to the middle of the river on either side of these bridges, either westbound or eastbound, as a practical railroading proposition it would be necessary to take them on to the other side of the river.

Furthermore, it must be remembered that a minimum of 136 trains cross each of these bridges each day; and even if crossovers could be constructed, with an average of a train each ten minutes on each bridge, it would not be possible to cut off a caboose and leave it on one of these main tracks used by this vast number of trains until a train came from the opposite direction and coupled on to the caboose. This would completely block the main line on the bridge used exclusively for interstate commerce and would fall within the prohibition of the rule laid down in K. C. Sou. Ry. v. Kaw Valley, 233 U. S. 75.

We do not go into great detail on this subject, because we covered it so fully in our brief (pp. 7, 8, 9, 10, 11). It is not a question of the cheapest way being the most practical way, as stated on page 8 of appellees' brief. It is simply a question of not being able to do the thing at all as a practical railroading proposition.

Furthermore, on page 8 of their brief, counsel for appellees say that there is no proof whatever in support of our statement contained on page 11 of our original brief that the furnishing of cabooses has always been considered a working condition. Again, we call attention to the fact that the furnishing of cabooses has always been consid-

ered a working condition and has been dealt with as such by appellant and the switchmen, and cabooses have always been since 1910 and are now being furnished by reason of written contracts between the Brotherhood and appellant (R. 82). On this question the record is clear (R. 79, 81, 82). In 1910 three cabooses were furnished by agreement (R. 81), and these were gradually increased by further agreements with the Brotherhood until at the time of the trial of this case, thirty-one cabooses were in actual use. In each instance these agreements were made with the men through the Brotherhood representatives, and the current agreement is shown in the record in full (R. 82), and it clearly recognizes the matter of furnishing of cabooses to be a working condition, and that it had always been treated as such. In addition to this, it is obvious that the question of whether or not cabooses are furnished for the sole use of the employes and as a means or method of doing their work clearly constitutes a working condition.

Furthermore, it is said in appellees' brief (pp. 8, 9) that all of the testimony of appellant relative to delay and cost was purely hearsay, and an isolated statement is quoted from the record (R. 142) as to the delay in one run, viz.: the run to the Pennsylvania yard, where the witness stated that he did not know of his own knowledge but that he was taking the word of his employes for it. This witness was the superintendent of appellant, having full knowledge of switching operations, and while it is true that as to the delays in the Pennsylvania Yard his knowledge was gained by hearsay, yet his testimony as to the delays on all other runs was from actual knowledge and observation. Furthermore, appellant produced its three general yardmasters in Illinois—L. E. Knight (R. 135), R. D. Parish (R. 130) and Walter H. Rolen (R. 122), all of whom corroborated the superintendent's testimony as to the average delay occasioned by the furnishing of cabooses. In addition, F. M. Heinlein, yardmaster for the

Pennsylvania Railroad, testified (R. 116) as to the delays in the Pennsylvania Yard and as to appellant's runs to and from this particular yard. He testified (R. 119) that there would be an average delay of between fifty minutes and one hour on a forty-car train from appellant's yards and taking a cut back with a caboose over what there would be without one, and that the maximum or top figure of delay would exceed one hour, not including any delay in appellant's own yard.

On page 9 of their brief counsel also attack the statement contained on page 13 of our brief that the initial cost of new cabooses would be $44,000.00, according to the testimony of the Commission's inspector. A reading of the quotation contained will show that we stated the facts, viz., that as estimated by the witness the initial cost of new cabooses would be $44,000.00 and that the extra annual expense in wages would be about $62,000.00, but that this estimate did not include anything except wages. It is said that this statement is neither fair nor accurate. We can see no distinction, as claimed by appellees, between the cost of new cabooses being $44,000.00 and the total investment being that amount. We never said, and do not say now, that the cost of new cabooses would be $44,000.00 each year, or that appellees' witness ever made that statement. We did say that he testified that the initial cost of the new cabooses needed would be $44,000.00, and that estimate was based on shelter cars and not on cabooses.

Furthermore, it is said that the Commission's inspector testified that the annual extra expense in wages for the handling of added cabooses would be something over $27,000.00 and not $62,000.00, as stated by us. We covered this matter rather thoroughly on pages 12, 13, 14 and 15 of our original brief and will not repeat those statements here, but will content ourselves with a defense of our statement, as shown by the actual testimony in this case.

Our brief conclusively showed that our testimony demonstrated that the original cost of new cabooses would be at least $150,000.00, and that the added annual expense would be at least $250,000.00. It is true that Inspector Thomas (R. 201) gave a summary of three sections of his report, without giving specific reference to the yards, as showing an extra annual amount in wages of $27,777.22. However (R. 186), he shows the miximum extra wages alone for the Madison Yard to be approximately $30,000.00, the maximum extra wages alone for the Wiggins Yard No. 2 to be more than $13,000.00, and (R. 200) the extra wages for the C. D. Yard to be $7,000.00, or a total of more than $50,000.00. It is impossible from Thomas' report to get his hypothetical figures as to minimum, actual, and maximum costs and reconcile the figures in one place in his report with other places. An examination of his entire report, as nearly as can be figured out accurately, shows under his testimony that the maximum delay would result in an outlay of about $62,000.00 per year for wages alone. Furthermore, this covered only wages, and it will be noted (R. 186) that Thomas stated in his report that the total annual operating expense for cabooses would be approximately two and one-fourth times the estimated annual crew wages for handling cabooses. Whether we take the figure at $27,000.00 or $50,000.00 or $62,000.00, when we multiply that by two and one-fourth we get annual extra cost of using cabooses of $60,000.00, $112,000.00 and $139,000.00, as opposed to our testimony of an expense of $250,000.00. It is immaterial here as to which of these figures we use—any one of them would be sufficient to support our contentions on the questions raised in this court.

Furthermore, counsel say that the estimates given by the Commission's expert were not hearsay, but were the result of ten or fifteen days spent by the witness in appellant's yards, riding various cuts in company with various

railroad officials. We have heretofore in our original brief shown the "show run" character of these so-called tests; and even with a much less delay than would result in actual switching, the witness' figures result as above set forth.

Furthermore (R. 166), appellant handled in 1938 an average of 60,000 cars a week, or a total for the year of 3,119,000 cars.

Counsel further says that our statement that the minimum delay, as shown by the undisputed testimony, would average at least eleven minutes per run is not correct; and they say that the record shows that the minimum handling time would be eleven minutes, and that there is a distinction between handling time and delay. We cannot see the distinction. If it takes a minimum of eleven minutes to handle a caboose that it would not have taken if a caboose was not handled, then necessarily there is eleven minutes added to the time necessary to transport a cut of cars from point of origin to point of destination. It must be remembered that appellant's evidence, based on actual experience, showed an average delay of forty minutes per run.

Appellees further deny our statement that the Supreme Court of Illinois found that the delay on each run would be from eleven to forty minutes, and quote from the decision of the Supreme Court on that point exactly as we did. We call attention to the quotation from the opinion contained on page 10 of their brief, and if we can read the English language at all, the Supreme Court of Illinois found that while the evidence before the Commission as to the amount of time consumed was in conflict, yet the evidence showed that it ranged from eleven minutes to forty minutes per movement. The Supreme Court also stated that appellees here concede that some time was required to add a caboose to these cuts of cars. We submit that this is a finding by the Supreme Court of Illinois that the mini-

mum delay, as shown by the evidence, was eleven minutes and the maximum forty minutes per run.

We have heretofore answered the statement made on page 10 of appellees' brief relative to the period of time that the rear switchman would use a caboose.

Counsel also complain concerning our statement that the caboose would only be used by one employe out of five in each run. It is true that a witness (R. 221) said that a switching crew consists of three men. And it is said that we have misquoted the evidence when we state that the caboose would be used by only one employee out of five in each run. It is true that there are three switchmen to each run, but there are also an engineer and a fireman on each run. The caboose would only be available for use by the rear switchman and the other two switchmen ride on the front end of the train, and, of course, the engineer and fireman ride on the engine. In fact, one of the witnesses for the Brotherhood testified (R. 21) that a minimum single crew was three switchmen and the maximum five, and that this did not include the engineer and fireman.

It is also said that all of the crew could use the caboose for equipment, temporary shelter, etc. We have clearly shown heretofore in this reply and also in our original brief that none of the crew could or would use a caboose except the rear switchman, and that he would be exposed to all hazards of switching with a caboose, except when the runs were being made between two yards of appellant. None of the crew had any need for a place to store equipment other than was furnished. They would have to ride on icy cars while switching in the yard; they would have to encounter the hazards of switching, except the rear switchman would have a place to ride between yards. The findings of the Commission (R. 8 to 12) clearly sustain our contention that a caboose would only be used by the rear switchman.

As to clearances, while it is true that the clearances are not good on the two bridges, yet there are no great hazards from improper clearances at any other places, as shown by the record.

Lastly, so far as the statement is concerned, reference is made to our argument concerning the financial losses of the company; and it is said that appellant earned over $1,100,000 in 1928, and also that it earned over $700,000 in 1939. There is not a particle of evidence in this record as to any earnings in 1939. The evidence in this case concerning earnings was taken in 1939 (R. 229). Furthermore, from 1930 to 1937, both inclusive (R. 229), there was a deficit in each year except one, and then the net earnings were only $19,000.00. The deficits for these years ranged from $123,000.00 to $1,127,000; and even if, as shown by this exhibit (R. 229) we include the years 1928 and 1929, when appellant made more than $1,800,000 for the two years, yet the deficit for the ten years from 1928 to 1937, even including these two good years and the year 1935 when a small profit was made, amounts to $1,191,000, or an average annual deficit for the ten-year period of $119,000.00.

Furthermore, it is said in appellees' brief (p. 11) that appellant could have operated and made more money even during these bad years. There is not a particle of evidence in this record to sustain this statement.

We have not answered all of the matters set forth in appellees' statement for the reason that in most instances we have conclusively shown in our original brief the truth of our statement and the falsity of the objections to it.

ANSWER TO INTRODUCTORY STATEMENT IN ARGUMENT.

So far as the distinction made in the Wickard case is concerned, all the Wickard case holds is that where Congress has legislated with respect to interstate commerce, its action is complete and all inclusive; that Congress can preempt the field of interstate commerce by legislation even though its regulation may affect intrastate commerce. The gist of the Wickard case is that it applies to federal powers only, although it does to some extent lessen the difference between direct and indirect interference with interstate commerce.

Under this heading counsel have sought to divide state regulation into two classes. As to one of these classes, they contend that state regulation would be void and as to the other they contend that it would be valid when exercised under the police power, unless the burden that it lays upon interstate commerce is unreasonable in contemplation of the object sought to be obtained or it is in conflict with the actual exercise of congressional power. As we have shown in our original brief, and shall later amplify in this reply, there is no such division of power, nor can legislation of the state be sustained under the police power if the necessary and practical effect of it is directly to delay, obstruct or burden interstate commerce, or necessarily to give to such legislation an extra-territorial effect so as to require its observance in another state.

It is not a question of the reasonableness of the legislation, but it is a question of whether it directly delays, obstructs or burdens interstate commerce or has an extra-territorial effect.

ANSWER TO POINT I OF APPELLEES' ARGUMENT.

Under this heading counsel lay down the premises that the regulation in question is a reasonable exercise of the State's police power and imposes no unconstitutional burden on interstate commerce. In support of this argument counsel advance a major and a minor premise. Under the major premise it is argued that if the order in question is not in conflict with applicable federal legislation, it must be sustained if it is a reasonable measure having for its purpose and legitimate object the preservation of life, health and the promotion of safety, and, if so, it may be enforced with respect to interstate commerce. As we have pointed out in our original brief, this is not the true test to determine the validity of legislation. This premise, as stated, is erroneous in not including the following conditions: It must not have an extraterritorial effect. So. Covington & Cincinnati St. Ry. Co. v. Covington, 235 U. S. 537. It must not materially obstruct the free flow of commerce. K. C. R. R. v. Kaw Valley etc., 233 U. S. 75-78. It must not directly burden, delay or obstruct interstate commerce. Lemke v. Farmers Grain Co., 258 U. S. 50, l. c. 59, and other cases cited in our original brief. It must not materially obstruct the free flow of commerce between the states. California v. Thompson, 313 U. S. 109, l. c. 113.

As was stated by this Court in Lemke v. Farmers Grain Co., supra, on p. 58:

> "This principle (meaning the police power) has no application where the state passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it."

Furthermore, in the Minnesota Rate Cases, 230 U. S. 352; l. c. 396, Mr. Justice Hughes, speaking for the Court, said:

> "If a state enactment imposes a direct burden on interstate commerce, it must fall regardless of federal legislation. The point of such an object is not that Congress has acted, but that the state has directly restrained that which, in the absence of federal regulation should be free."

In the Lemke case, supra, l. c. 59, this Court reaffirmed the doctrine of the Minnesota Rate Cases, and, quoting from page 400 of the latter opinion, said:

> "'"The principle, which determines this classification (between federal and state power), underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."'

We particularly call the Court's attention to the recent pronouncement of this Court in California v. Thompson, supra, and to the quotation therefrom appearing as a footnote on page 19 of appellees' brief.

But it is said by counsel because the Court has held that a state may license trainmen, that it may define the size of crews manning interstate trains within the state, that it may prescribe regulations for payment of wages, that it may require interstate passenger cars in the state to be heated, that it may regulate the speed of interstate trains within city limits, that it may require interstate railroads to eliminate grade crossings, that it may pass local quarantine laws applicable to merchandise moving in interstate commerce, and that it may regulate the use of its harbors and navigable waterways, that therefore the present order is valid in the exercise of the police power of the state. However, in none of these cases did

the legislation have an extra-territorial effect, in none of them was the free flow of commerce materially obstructed and in none of them was there any direct burden, delay or obstruction to interstate commerce.

Counsel also attack our construction of the South Covington case, supra. We discussed this case thoroughly in our original brief (pp. 48 to 52), and we refer the Court to that part of our brief and to the opinion itself in support of our interpretation of the case. The quotation from the opinion on page 49 of our brief clearly shows that the determination of this question must not be upon what the order purports to require, but upon what will result from its practical application in railroad operations. We further call the attention of the Court to the quotation from the opinion in the South Covington case appearing on page 50 of our original brief to the effect that that part of the ordinance relative to the maximum number of passengers and the minimum number of cars was held invalid because of the necessary extraterritorial effect of those provisions. It is said that the Covington case is authority for appellees' position because of the fact that the ordinance provisions relative to passengers riding on the rear and front platforms unless suitable barriers or rails were provided was sustained.

As to the provision concerning passengers riding on the platforms unless suitable barriers or rails were provided, this did not necessarily have an extraterritorial effect. The street car company was merely prohibited in Covington, Kentucky, from allowing passengers on these platforms unless these barriers or rails were provided; if it did not provide them, the passengers necessarily would be compelled to ride inside the car, but if they were provided then they could ride on the platforms. However, when the state line was reached, even though not provided with barriers or rails, there would be no reason why any passenger who wanted to could not ride upon either platform.

As to the provision for heating cars, this Court held that invalid, not on any question concerning interstate commerce, but upon the sole ground that it was impossible and impracticable in actual operation and therefore unreasonable.

Appellees' minor premise is merely that the instant order is such a reasonable exercise of the state's police power as to be within the rule stated in the major premise. In our original brief we have fully discussed this argument.

ANSWER TO POINT II OF APPELLEES' ARGUMENT.

Under this heading counsel contend that Congress has not by affirmative action pre-empted the subject matter of the present order from the jurisdiction or powers of the state. In our original brief we discussed this question rather fully and cited decisions of this Court in support of our contention. As to most of appellees' argument under this heading it would be mere repetition of our original argument if we answered it fully and in detail. There are several inherent defects, however, in appellees' argument.

We pointed out in our brief (p. 29) that if Congress has taken charge of the field a state cannot legislate in that field, even though the effect upon interstate commerce is indirect, and even though Congress has not legislated as to the particular matters involved. The question is whether Congress has taken possession of the field, and it is immaterial whether it has legislated concerning a particular matter within the field. Furthermore, it is not a question of whether the Interstate Commerce Commission or the Railway Labor Board have exercised the powers given to them by Congress by the issuance of regulations and orders. The true question is whether or not Congress has conferred that power upon the Commission and the Board. If it has, then the states are powerless to legislate

in that field, even though the effect on interstate commerce be indirect and incidental. The whole matter is a question of power and not whether the administrative bodies upon whom the power has been conferred have actually exercised it in the particular case.

On pages 32 and 33 of appellees' brief, Sec. 1, Paragraph 17 of the Interstate Commerce Act, U. S. C. A. Title 49, p. 120, is cited. This section provides that nothing in this chapter (meaning the Interstate Commerce Act) shall impair or affect the right of a state in the exercise of its police power to require just and reasonable freight and passenger service for interstate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of the chapter. This proviso applies only to just and reasonable freight and passenger service, which necessarily means service to the public and does not otherwise limit the effect of the act so far as it excludes power being conferred by Congress on the Commission to act. We have been able to find no Federal cases construing this section of the statute, but the construction we have given it seems to be the only reasonable construction that can be given to the language used. State cases in which the section has been so construed are: State v. Seaboard Air Line Ry. Co., 104 So. 602, 89 Fla. 410, 39 A. L. R. 1362; L. & N. R. Co. v. Brasher, 289 S. W. 1094, 217 Ky. 439; Chicago R. Co. v. State, 90 Okl. 173, 217 P. 147, and N. Y. C. R. Co. v. Public Utilities Com. of Ohio, 164 N. E. 427, 119 Ohio State 427; People ex rel. v. Public Service Com. of New York, 234 N. Y. S. 342, 226 App. Div. 43.

If Congress had intended to permit concurrent legislation by the state, it would have provided for that in the act itself. On this point we again call attention to the Illinois Natural Gas Company case, and the Clover Leaf Butter Company case, cited on page 43 of our original brief.

ANSWER TO POINT III OF APPELLEES' ARGUMENT.

Under this heading counsel contend that the order in question does not deprive appellant of its property without due process of law. This matter has been fully argued in our original brief and a large number of cases have been cited in support of our position. We do, however, desire to call the Court's attention to three cases cited in our original brief:

In Penn. Coal Co. v. Mahon, 260 U. S. 393, the owner of land containing coal deposits had deeded the surface with express reservation of the right to remove all the coal beneath, the grantees assuming the risk and waiving all claim to damages that might arise from such mining, and the property rights thus reserved, and contracts made, were valid under the state law, and a statute, enacted later, forbade mining in such way as to cause subsidence of any human habitation, or public street or building, and thereby made commercially impracticable the removal of very valuable coal deposits still standing unmined. It was held that the prohibition exceeded the police power, whether viewed as a protection to private surface owners or to cities having only surface rights, and contravened the rights of the coal owner under the contract clause of the Constitution and the due process clause of the Fourteenth Amendment.

In Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613, a statute of Kansas was involved, which, as construed by its courts, authorized the State Highway Commission to order a pipe line, at its own expense, to relocate and make certain other changes in its pipe and telephone lines, then located on a private right of way, to conform to plans adopted for new highways to

cross the right of way. This Court held that such statute deprived the company of its property without due process of law.

In Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510, this Court set aside an order of the Oregon Commission, requiring the making of track connections estimated by the railroad company to cost $21,000.00 and by the Commission to cost $7,000.00. It appeared that the connections would develop very little business and that the claimed public benefit would be slight. This Court held the order to be void as an arbitrary and unreasonable exercise of police power, depriving the railroad company of its property without due process of law.

In many of the cases cited on pages 58 and 59 of our original brief the laws were declared valid and in many of them they were declared invalid; but in all of them the test was the same, viz., the relation between the burden of cost and the resulting public benefit.

CONCLUSION.

Appellant, therefore, again asks this Court to reverse the judgment and order of the Supreme Court of Illinois, and to remand the cause to that court, with directions that it enter such orders as may be consistent with such opinion as this Court may render in this case.

All of which is respectfully asked and prayed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 218

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, CHAIRMAN AND STATE LEGISLATIVE REPRESENTATIVE, AND ILLINOIS COMMERCE COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 218

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, CHAIRMAN AND STATE LEGISLATIVE REPRESENTATIVE, AND ILLINOIS COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

APPELLEES' STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

While the above entitled cause is admittedly one of which this Court, under the Statutes, has technical jurisdiction on a direct appeal from the Supreme Court of the State of Illinois, these appellees assert that the unsubstantial character of the grounds upon which appellant relies is so apparent as to warrant the Court in summarily

disposing of the appeal at this stage of the proceedings upon a motion to dismiss or affirm under the provisions of Rules 7 and 12 of this Court as recently amended.

In view of the appellees' said position, this statement is respectfully submitted, and a motion to dismiss or affirm is included herein.

Corrections in and Additions to Appellant's Statement of the Facts.

Preliminary Statement.

The appellant's preliminary statements respecting the various procedural steps taken before the Illinois Commerce Commission and in the various Illinois courts are correct and adequate, as are also its statements respecting the technical jurisdiction of this Court, the various Illinois statutes involved, the date of the various orders and the taking of this appeal, and the timely and adequate presentation of the various Federal questions involved in the Illinois courts and their rulings thereupon.

With respect to the appellant's statement as to the facts, however, many of appellant's statements are inaccurate and wholly without support in the record, and appellant has omitted many facts which are not only favorable to these appellees but, we contend, are such as to sustain the order from which this appeal is prosecuted.

Corrections in Appellant's Statement.

Beginning at the top of page 6 of appellant's jurisdictional statement, appellant has considerable to say to the effect that it is impossible to cut off or couple a caboose on the bridges in the middle of the river, that as a practical proposition the necessary effect of the Illinois Commerce Commission's order is to require the appellant to carry its cabooses across the Mississippi River into

Missouri on West-bound cuts and to put cabooses on its trains in Missouri on the East-bound cuts in order to comply with said order, and that the Supreme Court of Illinois has found the facts to be as so stated by the appellant. From this counsel concludes that the order in question not only directly impedes, hinders and delays interstate commerce, but requires compliance in the State of Missouri where the Illinois Commission admittedly has no power, jurisdiction or authority.

As stated by appellant, this is inaccurate, insufficient, inadequate and rather misleading.

Counsel fails, for example, to point out that the evidence shows that on the approach to the Eads Bridge on the Illinois side there are two cross overs (Tr. 2-141), that on the approach to the Merchants Bridge on the Illinois side there is one cross-over (Tr. 2-28), that it would be quite possible to add other cross overs on these bridges in the State of Illinois (Tr. 2-29), and that before the tracks enter the tunnel on the Missouri side there is an interval of some 500 feet (Tr. 2-108).

While it may well be that the *cheapest* and therefore *most practical* way to comply with the order in question would be to leave the caboose attached to a train after it had left Illinois going West, and to attach a caboose on an East bound train before leaving Missouri, it does not follow that the necessary effect of said order is to require compliance in the State of Missouri.

At pages 6-7 of appellant's statement, counsel states that

> "The furnishing of cabooses has always been considered a working condition and has been dealt with as such by appellants and its switchmen, and cabooses have always been and are being furnished by reason of written contracts between the Brotherhoods and appellant (Tr. 2-114, 115)."

This is inaccurate. The record in no wise sustains counsel's statement that the furnishing of cabooses has been considered a "working condition" and the balance of his statement is misleading in that it fails to make it clear that cabooses were furnished only on certain runs and at certain times of the season.

Counsel's statements, at pages 7-8 of the statement, respecting appellant's evidence as to the delays and costs to result from the order requiring cabooses fails to point out that the testimony in question was the purest kind of hearsay, and was, in a large measure, based on information acquired by the witness second hand from various railroad officials. For example, appellant's witness testified (Tr. 2-198):

> "When I say there is a delay of one hour in the Pennsylvania yard, I do not know that of my own knowledge. I am taking their word for it."

His estimate of a 40 minute delay and $10.00 cost per run was likewise without factual basis in the record, and his estimate of a $400,000 outlay for the first year was of the same incompetent character.

At page 8 of the statement, counsel briefly summarizes the testimony of the Commission's expert witness and says that his testimony was that

> "the initial cost of new cabooses would be $44,000 per year and the extra annual expense in wages about $62,000, but this estimate did not include anything except wages (Tr. 2-123)."

This is neither fair nor accurate. In the first place, his estimate for the cost of cabooses was *not* $44,000 *per year*. It was a *total investment* of $44,000 in new cabooses. In the second place, this estimate was based on 36 new cabooses at a cost of $1,233.69 each (Tr. 2-266) which is the cost esti-

mated not by the appellee but by the appellant itself (Tr. 2-241). In the third place, the annual extra expense in wages for those handling the added cabooses was estimated at $27,777.22, not $62,000.

Counsel also fails to point out that these estimates given by the Commission's expert were not hearsay, but were the result of ten or fifteen days spent by the witness in appellant's yards riding the various cuts in company with railroad officials. (Tr. 2-122-125).

Furthermore, counsel's statement that the "delay would average 11 minutes per run" is not correct. The testimony was that the "handling time" would be 11 minutes per run, which would actually result in perhaps only 3 minutes "delay" per run (Tr. 2-126).

Counsel's next statement that

> "The Supreme Court of Illinois found that the delay on each run would be from eleven to forty minutes (Tr. 13)."

is likewise not correct. The nearest approach to such a statement in the opinion is to be found at page 412 of 379 Illinois, where the court says:

> "The evidence before the commission as to the amount of time consumed was in conflict, ranging from eleven minutes to forty minutes per movement, although appellant (now appellee) concedes that some time is required to add a caboose to these cuts of cars."

Appellant's next statement to the effect that the rear switchman would be able to use the caboose only from one-sixth to one-eighth of his working period, that during the balance of his time he would be exposed to the same or additional hazards, and that the Supreme Court in its opinion so found is not correct and is not supported by the record.

With respect to the facts sustaining the Commission's order as a reasonable and proper "police power" measure

to protect the lives and limbs of the trainmen and passengers, the statement is completely silent. In our opinion this is unfair and requires us to add such facts so as to have the true record before this Court.

Additions to Appellant's Statement.

The Brotherhood of Railroad Trainmen is an organization representing trainmen and switchmen who are employed by the Terminal Railroad Association of St. Louis, Respondent (Tr. 2-25, 84). The said Respondent is an association which performs terminal services in the switching district of East St. Louis, Illinois, for and on behalf of its proprietary lines and other railroad companies desiring use of its facilities (Tr. 2-211). The corporate control of the said Terminal Railroad Association is vested equally in each of the following railroad companies: The Alton Railroad Company; Baltimore & Ohio Southwestern Railroad Co.; Chicago & Eastern Illinois Railway; Chicago, Burlington & Quincy Railroad Co., Chicago, Rock Island & Pacific Railroad Co.; Cleveland, Cincinnati, Chicago & St. Louis Railway Co.; Illinois Central Railroad Co.; Louisville & Nashville Railroad Co.; Missouri, Kansas, Texas Railroad Co.; Missouri, Pacific Railroad Co.; Missouri Pacific Acct. St. Louis Iron Mountain & Southern Railroad Co.; Pittsburgh, Cincinnati; Chicago & St. Louis Railroad Co.; St. Louis-San Francisco Railway Co.; St. Louis Southwestern Railway Co.; Southern Railway Co.; Wabash Railway Co.

Switchmen are assigned to particular crews. The switchmen make and break up trains in yards, switch industries, make deliveries from connections to the Terminal Railroad Association from through lines and make transfer runs from and to various yards of the Terminal Railroad Association and perform that work in the yards or industries, required to make up trains and couple cars together. They see that

the air brakes are coupled, and in order on the train, and when a train leaves the yard for a destination, the switchmen take their proper positions on the train with the rear man taking his position on the rear car of the train (Tr. 2-27). The rear man is required to ride the rear coupler of the car in the event of overhead and side structures not clearing the man on the top or side of the car (Tr. 2-27). He lines all switches back in a proper position when they have been used by his train and, in case of reverse movement, when a train is shoved, is required to protect street and highway crossings to keep the public from being killed or injured. When shoving a train near-by or on private crossings, he is required to be on top of the rear car, unless prevented by overhead or side structures that do not clear the switchman (Tr. 2-27, 40).

The length of the trains in operation handled by trainmen on one trip vary from one to a hundred cars (Tr. 2-120, 139, 140, 141, 144).

A caboose is a railroad car furnished for the housing of train crews and equipped for their safety. They are needed to avoid side and overhead structures which endanger the life and limb of the switchmen and to provide for them a safer place in case of derailment of the train or sudden jerking or sudden stops which would be liable to throw switchmen from the top, side or end of the car (Tr. 2-29). In case a train breaks in two, it is very dangerous for a man to be on the rear end of the train, as it is easy to be knocked off the top or end by a sudden jerk or stop (Tr. 2-29). It also protects the switchmen from the inclement weather in both winter and summer. During the winter months the hand-holds, drawbars and sill steps of cars are often covered with ice, making it difficult for the switchmen to get on top of a car and making it very easy for said switchmen to be jerked or bumped

off (Tr. 2-29, 30, 56, 84). He could discharge his duties from the interior of the caboose or from the steps outside the caboose (Tr. 2-84).

A caboose also provides a place for the switchmen to keep and carry their necessary flagging equipment, clothing such as rain clothes, coats, etc., and to carry their necessary first aid equipment and lunches and permit the lighting of red lanterns during inclement weather. It is also used to do such clerical work as is necessary when the train is en route (Tr. 2-29, 57). Switchmen can observe their train better while it is en route and watch the side of their train from a caboose. It is hazardous for a switchman on top of a car or on the end of a car to observe the side of his train (Tr. 2-29). A caboose is properly equipped with a whistle and a conductor's valve which permits the switchman on the rear end of the train to have practically the same control of the train that the engineer has with reference to stopping or sounding a warning signal on approaching a highway crossing, etc. (Tr. 2-30, 40). He can perform all the necessary work better from the caboose (Tr. 2-30). Where no caboose is provided, switchmen are required to carry their lunch in their pocket or tie it on if some suitable place can be found (Tr. 2-40).

A switchman can perform the necessary duties better from a caboose in observing the running condition of his train, and in flagging and in getting off and on the rear end of his train, in moving motion, also in shoving or back-up movements of trains (Tr. 2-30).

It is admitted that no cabooses or shelter cabs are provided for any of the crews working out of certain yards herein involved (Tr. 2-227). Cabooses are furnished part of the year on others and furnished in some instances all the year round (Tr. 2-242).

There are various transfer runs *within the confines of the State of Illinois* which go onto the Eads and Merchants Bridges which span the Mississippi River (Tr. 2-251). Most of the overhead and side clearances on these two bridges are insufficient to clear a switchman (Tr. 2-28, 253, 263).

Cabooses are not furnished on most of the transfer runs out of Madison Yard or CD Yard in Illinois moving onto these two bridges. Cabooses are furnished upon certain transfer runs originating in the Wiggins No. 2 Yard, Illinois, and moving onto the Merchants Bridge but only between October 15th and May 1 (Tr. 2-251).

At many points there exist numerous insufficient clearances for a switchman to ride the *top* of the rear car (Tr. 2-43, 46, 47, 49, 53, 72); and the rules of the Terminal Railroad Association expressly provide that the switchmen must ride the top of the rear car (Tr. 2-43); although another rule provides that "riding on the inside of loaded open top cars is prohibited" (Tr. 2-196, 197). Some of these clearances are such that a switchman cannot ride the *side* of the car without being knocked off (Tr. 2-44, 47, 48, 49, 50, 52, 59, 72).

The testimony of one R. B. Thomas, Chief Railroad Inspector for the Illinois Commerce Commission, discloses numerous insufficient vertical and horizontal clearances on various runs, including the runs onto the Eads and Merchants bridges. His reports contain photographs showing the switchmen riding on the rear drawbar of the last car of the train and also showing the various insufficient clearances (Tr. 2-141, 210, 266, inclusive). His testimony clearly shows that the dangers and hazards in question could be eliminated by providing a caboose for the man to ride in (Tr. 2-141).

Often the rear switchman rides the drawbar at the trailing end of the rear car. If the end of the car on which

he was riding happened to be the end that was provided with a break staff, the switchman is required to grasp it as a means to secure himself in place. If no break staff is provided he is required to reach further out towards the side of the car in order to reach the end ladder or other handholds. He is also required to brace himself against the end of the car to avoid being shaken off due to sudden stops and starts. Photographs showing a switchman in riding position and details of footing, etc., will be noted (Tr. 2-227). The appellant admits a very serious accident on the Ehds Bridge to a switchman, Mueller, who was riding on the rear drawbar, when he was jerked off the car and injured (Tr. 2-196, 197).

In many instances the trains move up steep inclines fraught with danger. If cars break off, it is very difficult to stop such cars and to avoid loss of life of the public (Tr. 2-45, 50, 52). The evidence shows many unprotected crossings (Tr. 2-45, 50, 51).

In many instances without a caboose, the switchman is required to stand on the top of the last car in the train while shoving, and facing sleet and snow and rain storms and wind. In such cases the switchmen are unable to see where they are going and are required in many instances to turn their backs for shelter. If this is done such switchmen cannot observe highway crossings or other dangerous points (Tr. 2-30).

In many instances the rear switchman or foreswitchman cannot see the head switchman (45 car lengths away) until the train gets onto a straight road (Tr. 2-34). In some instances it is necessary to shove a train without being able to see. Sometimes the cars break off and roll down and it is impossible to stop them by hand brake, in which case it is necessary for the switchman to run ahead of the cars to protect the public (Tr. 2-34). With the use of a caboose with air brakes properly working, the rear man

would be able to stop in case of such an emergency. A caboose is provided with a conductor's valve (Tr. 2-35), so that he can control back-up movements of his train with an air valve provided on the caboose for the purpose of setting the brakes. He can also, with the whistle that is provided on the caboose, warn the public at or near crossings (Tr. 2-84). The ability of a switchman using a caboose, to stop the cars or warn an approaching train is far greater than it is when he is riding on a drawbar or on the top of a car (Tr. 2-85).

The evidence shows that other railroads operating runs parallel with the appellant operate with cabooses, namely, the Pennsylvania, the runs from Rose Lake to Madison Yards; the Illinois Central; the C. & E. I., Madison, Illinois to East St. Louis, Illinois; the Rock Island Railroad, Madison Yard to East St. Louis, Illinois; the Chicago, Burlington & Quincy at Madison Yard and the C. T. Junction; the Illinois Central; the Big Four from East St. Louis, Illinois to Granite City, Illinois; the Alton Railroad out of Venice to various yards (Tr. 2-39).

The evidence also shows that various other railroads operating over the appellant's tracks in East St. Louis, Illinois District and under substantially the same conditions, have the use of cabooses (Tr. 2-75, 76, 81, 83, 118). As a switchman employed by the Illinois Central testified, "we take a caboose on any run we want a caboose on" (Tr. 2-83).

At the conclusion of the hearings before the Commission, it found that cabooses were necessary on the runs in question because of the operating hazards and dangers to the life, health and safety of the trainmen, employees and the general public and ordered the appellant to furnish such cabooses (Tr. 2-1).

The Circuit Court's Order did not challenge the Commission's findings as to the necessity for cabooses but reversed

the Commission's Order solely on the ground that to order the use of cabooses on such runs as went onto the Eads and Merchants bridges constituted an interference with interstate commerce beyond the power of the Illinois Commerce Commission (Tr. 2-270).

In passing upon the above evidence the Supreme Court of Illinois, at 379 Ill. 403, at pages 405, 406, 411, 420 and 421, said:

> "Appellee (now appellant) is a railroad corporation which performs terminal services in the railroad switching district of East St. Louis, Illinois, and St. Louis, Missouri. Switchmen in its employ are assigned to particular switching crews. These crews make and break up trains in the yards, make deliveries from connecting roads to appellee; make transfer runs from the various yards of appellee to and from industries; make up trains and couple cars together, see that the air brakes are coupled and in order on the train, and when the train leaves the yard for a destination the switchmen take their proper positions on the train, the rear man taking his position on the rear car of the train, where he is required to ride. His duties are to line all switches back into proper position after their use by the train, and in case of a reverse movement, to watch street and highway crossings to protect the public. On some of the transfer runs, side or overhead clearance is insufficient to permit riding on the side or top of the rear car, in which case the rear switchman is required to ride the rear coupler of the car. The length of the trains handled by a crew on a trip varies from one to a hundred cars. A caboose is a railroad car furnished for the housing of train crews and equipped for their safety; provides a place for the crew to carry necessary flagging equipment, raincoats, extra or excess clothing, necessary first aid equipment and lunches; also to do any necessary clerical work. During the winter months, the handholds, draw-bars and sill steps of cars are often covered with ice, making it difficult for switchmen to get to the top of a car or to prevent

being jerked or jarred off. No caboose or shelter cars are furnished to crews working out of certain of the involved yards, though they are furnished from October to May each year on other runs by appellee, and on still other runs are furnished the year round."

* * * * * * *

"The evidence shows that without cabooses or shelter cars, switchmen are required to ride on the outside of the rear car of the cut of cars being moved, and that in many places in the yards and on the bridges, side or overhead clearances are insufficient to permit riding on the side or top of the cars, with the result that the switchman is required to ride upon the coupler, which is dangerous and becomes specially so during storm or winter periods. It is shown that the jarring or sudden stopping or starting of a cut of cars may cause the switchman to lose his hold and be thrown and to suffer injury."

* * * * * * *

"That there is substantial danger to switchmen that can be avoided by these cabooses or shelter cars, seems clear."

* * * * * * *

"We are of the opinion that the order of the commission as a whole was a valid exercise of the police power and that the circuit court erred in setting that order aside."

Statement of the Grounds Upon Which It Is Contended by Appellees That the Federal Questions Involved Are Not Substantial in Character.

I.

The order of the Illinois Commerce Commission was a reasonable police regulation for the protection of the health, lives and safety of persons within the confines of the State of Illinois, and its effect upon interstate commerce was only incidental.

Under Points A and B, counsel for appellant contends that the effect of the order of the Illinois Commerce Commission was to lay a direct and substantial burden upon interstate commerce, from which he concludes that such an order is unconstitutional even though it may not conflict with or be repugnant to any action taken by the Federal Congress.

Under this point we contend that it is clear, under the facts of this case, that the said order requiring cabooses *within the confines of the State of Illinois* was a proper police regulation for the promotion of the health, lives and safety of persons within the confines of said State, and that its effect upon interstate commerce (if any it had) is only incidental in character. From this we conclude that it would only be invalid if in conflict with or repugnant to some action taken by the Federal Congress, and under Point II hereof, we assert that there is no such conflict or repugnancy.

Of course it is the law, as appellant contends at pages 43 and 44 of its suggestions, that if the order purports to lay a *direct* burden on interstate commerce it is invalid even though not in conflict with or repugnant to any action of the Congress, but, on the other hand, it is equally well settled that where a police regulation of a State affects in-

terstate commerce only indirectly it is not invalid merely because of that incidental effect, and only falls where in conflict with some action of the Congress.

This Court, in the case of *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1161, in discussing the distinction between a direct and indirect effect on interstate commerce, at page 307, said:

> "The distinction is *not formal, but substantial in the highest degree*; as we pointed out in the Schechter Case, *supra*, p. 546 *et seq.* 'If the commerce clause were construed,' we there said, 'to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control.' It was also pointed out, p. 548, that 'the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system.'"

In the case of *Chicago, Rock Island and Pacific Railroad Co.* v. *Arkansas*, 219 U. S. 453, this Court brushed aside the contention that the Arkansas Full Crew Law conflicted with the Commerce Clause. After reviewing its prior decisions to the effect that the power to regulate commerce did not of its own force and without legislation of Congress, impair the authority of the states to establish reasonable regulations for the protection of the health, the lives or the safety of their people, the Court, at pages 465 and 466, said:

> "The principles announced in the above cases require an affirmance of the judgment of the Supreme

Court of Arkansas. *It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the safety of all engaged in business or domiciled within its limits.* Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the State. Local statutes directed to such an end have their source in the power of the State, never surrendered, *of caring for the public safety of all within its jurisdiction;* and the validity under the Constitution of the United States of such statutes is not to be questioned in a Federal Court unless they are clearly inconsistent with some power granted to *the general government, or with some right secured by that instrument, or unless they are purely arbitrary in their nature.* The statute here involved is not in any proper sense a regulation of Interstate Commerce, nor does it deny the equal protection of the laws. *Upon its face, it must be taken as not directed against Interstate Commerce, but as having been enacted in aid, not in obstruction, of such commerce, and for the protection of those engaged in such commerce* • • •"

"• • • Undoubtedly. Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect to the number of employes to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does, the statutes of the state, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction must control. This principle has been firmly established, and is a most wholesome one under our systems of government, Federal and State • • •"

"*So long as Congress does not occupy the field of regulation under consideration, each state is empowered to regulate in this field with respect to the safety of*

persons in interstate commerce that passes through the State; therefore, it follows that it is immaterial that the various states may or may not enact full crew requirements in so far as the Commerce Clause is concerned. *Any inconvenience that may occur as a result of the various state laws on this subject is immaterial.*" (Italics ours.)

In the subsequent case of *Atlantic Coast Line R. Co.* v. *State of Georgia*, 234 U. S. 280, the validity of a Georgia statute requiring all railroad companies to equip their locomotives with electric headlights was assailed as being an unwarrantable interference with interstate commerce. This Court, speaking through Mr. Justice Hughes, in sustaining the Act in question, at pages 290, 291 and 292, said:

"Finally, it is urged that the statute constitutes an unwarrantable interference with interstate commerce. The locomotive with respect to which the accusation was made was at the time being regularly used in the hauling of interstate freight trains over the company's main line of railroad, and was equipped with an oil headlight. The statute, as the supreme court of the state said, was not directed against interstate commerce, but it was held that it incidentally applied to locomotives used in hauling interstate trains while these were moving on the main line in the state of Georgia. This being so, the act is said to be repugnant to the exclusive power of Congress. It is argued that if Georgia may prescribe an electric headlight, other states through which the road runs may require headlights of a different sort; that, for example, some may demand the use of acetylene, and that others may require oil; and that, if state requirements conflict, it will be necessary to carry additional apparatus and to make various adjustments at state lines, which would delay and inconvenience interstate traffic.

"The argument is substantially the same as that which was strongly presented to the court in *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, 41 L. Ed.

853, 17 Sup. Ct. Rep. 418, where the plaintiff in error was held subject to penalty for the violation of a New York statute which in substance made it unlawful for any steam railroad doing business in that state to heat its passenger cars, on any other than mixed trains, by any stove or furnace kept inside of the car or suspended therefrom. The railroad company was a Connecticut corporation having but a few miles of road within the State of New York, and operating through trains from New York through Connecticut to Massachusetts. As this court said in its opinion, the argument was made that 'a conflict between state regulations in respect of the heating of passenger cars used in interstate commerce would make safe and rapid transportation impossible; that to stop an express train on its trip from New York to Boston at the Connecticut line in order that passengers may leave the cars heated as required by New York, and get into other cars heated in a different mode, in conformity with the laws of Connecticut, and then at the Massachusetts line to get into cars heated by still another mode, as required by the laws of that commonwealth, would be a hardship on travel that could not be endured.' But the court ruled that these 'possible inconveniences' could not affect 'the question of power in each state to make such reasonable regulations for the safety of passengers on interstate trains as, in its judgment, all things considered, is appropriate and effective.'

In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal action, the use of such agencies, which, unless carefully guarded, was fraught with danger to the community, should go unregulated, and that the states should be without authority to secure needed local protection. The requirements of a state, of course, must not be arbitrary, or pass beyond

the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state, in the exercise of a similar power, may not impose the same regulation. We may repeat what was said in *Smith* v. *Alabama*, 124 U. S. 465, 481, 482, 31 L. Ed. 508, 513, 514, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564: 'It is to be remembered that railroads are not natural highways of trade and commerce. * * * The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the state. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. * * * The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution. (Citing cases.)

"If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced,—if there appears to be need of standardization of safety appliances, and of providing rules of operation which will govern the entire interstate road, irrespective of state boundaries,—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the state, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress, in its control of interstate commerce, to establish such regulations as, in its judgment, may be deemed appropriate

> and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

A rather similar situation arose in the case of *Whitney* v. *Johnson*, 37 F. Supp. 65 (statutory three-judge court, 1941), affirmed by this court *per curiam* in 314 U. S. 574, where a Kentucky statute limiting truck weights to 18,000 pounds was attacked on the ground that

> "because of this limitation Kentucky is seriously interfering with interstate commerce. That it is so far out of line with other states from which and to which tonnage must pass, in gross weight permitted to be carried, that there is produced a 'bottleneck' which seriously interferes with the national defense."

The trial court refused to enjoin the enforcement of the Kentucky statute on the ground that it was within the power of the state to regulate such matters, and this Court affirmed.

There, as here, the regulation unquestionably had *some* effect on commerce outside the state, but such effect was merely incidental.

In the recent case of *California* v. *Thompson*, decided April 28, 1941, 313 U. S. 109, 85 L. Ed. 793, this Court reviewed the law and, at page 113, said:

> "As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, *even though the regulation affects interstate commerce.* Ever since *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245, 7 L. Ed. 412, and *Cooley* v. *Port Wardens*, 12 How. (U. S.) 299, 13 L. Ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which be-

cause of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in *Di Santo* v. *Pennsylvania, supra,* (273 U. S. 40, 71 L. Ed. 528, 47 S. Ct. 267).

"A state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. *Smith* v. *Alabama,* 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564, 1 Inters. Com. Rep. 804; *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96, 32 L. Ed. 352, 9 S. Ct. 28, 2 Inters. Com. Rep. 238. It may define the size of crews manning interstate trains. *Chicago, R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275; *Missouri P. R. Co.* v. *Norwood,* 283 U. S. 249, 75 L. Ed. 1010, 51 S. Ct. 458, 30 N. C. C. A. 639, and prescribe regulations for payment of their wages. *Erie R. Co.* v. *Williams,* 233 U. S. 685, 58 L. Ed. 1155, 34 S. Ct. 761, 51 L. R. A. (N. S.) 1097. It may require interstate passenger cars to be heated and guard posts to be placed on bridges of an interstate railroad. *New York, N. H. and H. R. Co.* v. *New York,* 165 U. S. 628, 41 L. Ed. 853, 16 S. Ct. 418. It may limit the speed of interstate trains within city limits. *Erb* v. *Morasch,* 177 U. S. 584, 44 L. Ed. 897, 20 S. Ct. 819. It may require an interstate railroad to eliminate grade crossings. *Erie R. Co.* v. *Public Utility Comrs.,* 254 U. S. 394, 409, 412, 65 L. Ed. 322, 333, 334, 41 S. Ct. 169, P. U. R. 1921C 143. It may pass local quarantine laws applicable to merchandise moving in interstate commerce as a means of protecting local health. *Morgans, L. & T. R. R. & S. S. Co.* v. *Louisiana,* 118 U. S. 455,

30 L. Ed. 237, 6 S. Ct. 1114; *Compagnie Francaise de Navigation a Vapeur* v. *State Bd. of Health*, 186 U. S. 380, 460 L. Ed. 1209, 22 S. Ct. 811. It may regulate and protect the safe and convenient use of its harbors and navigable waterways unless there is conflict with some act of Congress. *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245, 7 L. Ed. 412, *supra*; see *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 267, 80 L. Ed. 215, 219, 56 S. Ct. 194."

The most recent (December, 1941) expression of this Court on this point is that to be found in the case of *Duckworth* v. *Arkansas*, 314 U. S. 390, 62 S. Ct. 311, where this Court, at page 394, said:

"While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce. As we had occasion to point out at the last term of Court, there are many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity, and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, in the absence of supervening Congressional action, have for the most part been sustained by this Court, notwithstanding the commerce clause. See *California* v. *Thompson*, 313 U. S. 109, 113, *et seq.*, and cases cited. See also cases collected in

Di Santo v. *Pennsylvania*, 273 U. S. 34, 39, 40, and in *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 188, Note 5, and 191.

* * * * * * *

"Of recent years, the Court has sustained state regulation of the size and weight of motor cars moving interstate, designed to insure the safe and economical use of the states' highways. *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* and cases cited. A state may police 'caravans' of motor vehicles moving over its highways in interstate commerce and charge a compensatory license fee for doing it. *Morf.* v. *Bingaman*, 298 U. S. 407; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583. It may, in the interest of public safety and convenience, restrict particular types of motor vehicles moving in interstate commerce, to particular areas. *Sproles* v. *Binford*, 286 U. S. 374, 393-5; *cf. Clark* v. *Paul Gray, Inc., supra*, 598. And a state may undertake to insure the fitness of those negotiating contracts for interstate transportation, by licensing them and requiring a bond to insure their good behavior. *California* v. *Thompson, supra.*"

The principal case upon which appellant relies is that of *South Covington & Cincinnati Ry. Co.* v. *Covington*, 235 U. S. 537. *The fact is that the Covington case, relied upon by appellant as being conclusive of the issues, in fact actually supports appellees' position herein* and confirms the principles announced in the cases relied upon by us without in any wise changing or modifying or reversing any of them.

An examination of the case discloses that it originated in a petition filed by the South Covington and Cincinnati St. Railway Co. in the state courts to enjoin the City of Covington from enforcing a city ordinance regulating the operation of street cars of the company. The ordinance in question provided (1) that no street car company shall

permit more than one-third greater number of passengers to be transported over and above the number for which seats are provided in the cars; (2) *that the street car company shall not permit any passenger to ride upon the rear platform of any car unless same be provided with a suitable rail or barrier so arranged as to provide an open space reasonably sufficient for egress and ingress of passengers to and from such car (3) that the street car company shall not suffer or permit any person or passenger to ride upon the front platform of any car unless a rail or barrier be provided, separating the motorman from the balance of the front platform (4) that the company shall at all times keep its cars thoroughly cleaned and ventilated and shall at least once a week fumigate the inside of said cars with disinfectant subject to the control of the Board of Health of the City of Covington* (5) that the temperature of the cars shall never be permitted to be below 50° Fahrenheit, and (6) that the street car company run and operate cars in the City of Covington in sufficient numbers at all times to reasonably accommodate the public.

The state courts refused the injunction and dismissed the petition. The testimony showed that the plaintiff was carrying passengers from Covington, Kentucky, to Cincinnati, Ohio, and that the traffic was conducted by means of continuous trips for single fare without change of motormen or conductors. This Court said, page 545:.

> "Reaching the conclusion that the traffic here regulated is of an interstate character, and therefore within the control of the Federal Congress, the further question is presented: Does the case come within that class wherein the state may regulate the matter legislated upon until Congress has acted by virtue of the supreme authority given it by virtue of the commerce clause of the Constitution. *In numerous instances this court has sustained local enactments, passed in the exercise of the police power of the state, in the interest of the*

public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce. The subject was given most consideration in the Minnesota Rate Cases (*Simpson* v. *Shepard*) 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 S. Ct. Rep. 729, and the previous cases dealing with this subject are therein collected and reviewed. *In the light of these cases, and upon principle, the conclusion is reached that it is competent for the state to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety, and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce.*" (Italics ours.)

This Court thereafter proceeded to hold that the sections of the ordinance embodied in paragraphs 1 and 6, making it unlawful for the company to permit more than one-third greater number of passengers to ride or be transported in its cars over and above the number for which seats were provided therein, directly affected interstate commerce. The testimony showed that in order to comply with these regulations the plaintiff would require about one-half more than the present number of cars which the company then operated and more cars than it could operate in Cincinnati within the franchise rights and privileges held by the company or controlled by it in that city.

This Court said, page 547:

"*These facts, together with the other details of operation* of the cars of this company are to be taken into view in determining the nature of the regulation herein attempted and whether it so *directly* burdens interstate commerce as to be beyond the power of the State."

It was by reason of these peculiar conditions that this Court concluded that such portion of the ordinance regulating the number of passengers and the number of cars

to accommodate the public was a direct burden upon interstate commerce.

The significant fact, however, is that this Court proceeded to hold that other portions of the ordinance were valid and only incidentally affected interstate commerce and reversing the State courts in that respect, and said (page 548):

> "There are other parts of the ordinance which we are of opinion are *within the authority of the state, and proper subject matter for its regulation;* at least, until the Federal authority is exerted. *These are the provisions with reference to passengers riding on the rear platform unless the same be provided with a suitable rail or barrier, etc., and as to persons riding upon the front platform unless a rail or barrier be provided,* separating the motorman from the balance of the front platform, *as well as those provisions with reference to the requirement to keep the cars clean and ventilated and fumigated. We think these regulations come within that class in which this court has sustained the right of the local authorities to safeguard the traveling public, and to promote their comfort and convenience, only incidentally affecting the interstate business, and not subjecting the same to unreasonable demands. New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co.* v. *Ohio,* 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. Rep. 465; *Atlantic Coast Line R. Co.* v. *Georgia,* 234 U. S. 280, 291, 292, 58 L. Ed. 1312, 1317, 1318, 34 Sup. Ct. Rep. 829." (Italics ours.)

We submit that there is a close analogy between the requirement in the Covington ordinance requiring the street car company to provide the rear platforms with a suitable rail or barrier and as to persons riding upon the front platform with a rail and barrier separating the motorman from the balance of the front platform and to keep the cars clean, ventilated and fumigated, and the requirement

of the Commission in this case to provide a caboose for the life, health and safety of the switchmen riding thereon. The very purpose of the caboose is to safeguard the employee just as the suitable rail or barrier on the front and rear platforms provided for in the Covington ordinance was to safeguard the traveling public. The mere fact that a caboose might be taken over the Eads Bridge and Merchants Bridge into the State of Missouri is purely incidental, *just as the rail or barrier on the front and rear platforms on the street car would necessarily be taken from* Covington, Kentucky, into Cincinnati, Ohio.

Counsel for appellant erroneously assumes that the distinction between the portion which this Court held valid and enforceable and that which it held to be beyond the power of the city, was due to the fact that the valid portions of the ordinance could be enforced wholly in Covington without necessarily being enforced in Cincinnati, whereas, in the invalid portion, as to the number and amount of cars and number of passengers to be carried, could not be enforced in Covington without also being enforced in Cincinnati.

This was not the basis of the court's decision. The valid portions of the ordinance were sustained on the ground that the local authorities had the right to safeguard the traveling public and promote their comfort and convenience even though it incidentally affected the interstate business, so long as it did not subject the same to unreasonable burdens, whereas, the other portions of the ordinance which were held to be invalid were so held because other factors above discussed existed.

It will be noted that if the City of Covington could require suitable rail or barrier with respect to the rear or front platform of the car, there was nothing to prevent the City of Cincinnati from requiring other safeguards to be erected or installed upon the street cars for the protection of the passengers. This Court undoubtedly had this pos-

sibility in mind since it adverted to this fact in connection with the invalid portions of the ordinance. However, in spite of this possibility, the court, nevertheless, held the provisions pertaining to the comfort, convenience and safety of the traveling public as affecting the interstate commerce *only incidentally* and not subjecting the same to unreasonable burdens.

We submit that the requirement of furnishing a caboose for the protection of the switchmen has no more direct effect upon interstate commerce than the requirement of the Arkansas Full Crew Law, enacted for the public safety, which the Supreme Court of the United States upheld as having been enacted "in aid not in obstruction" of interstate commerce, "and for the protection of those engaged in such commerce," and that "*any inconvenience*" that may occur as a result of the various State laws on this subject is immaterial. *Chicago Rock Island & Pacific Railroad Co. v. Arkansas*, 219 U. S. 453, 466.

There is no material distinction between the requirement of furnishing a caboose in our case and the requirement of the Georgia Statute involved in *Atlantic Coast Line v. Georgia*, 234 U. S. 280, wherein railroad companies were ordered to equip their locomotives hauling interstate freight trains with electric headlights. This Court held that although the locomotive was at the time being regularly used in the hauling of interstate freight trains, the Statute was not directed against interstate commerce but merely indirectly affected interstate commerce.

There, as here, it was contended that if Georgia may prescribe an electric headlight other States through which the road runs may require lights of a different sort and that if the State requirements conflict it would be necessary to carry additional apparatus and to make various adjustments at State lines which would delay and inconvenience interstate traffic.

But the court held that the effect upon interstate commerce was merely incidental and the State was not to be denied its power to protect life and property within its borders.

A similar contention was made in *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, as to electric headlights which were required by New York law to be installed on interstate trains running from New York City to Boston, Massachusetts, and the court held that these "possible inconveniences" could not affect the question of power in each State to make reasonable regulations for the safety of passengers on interstate trains as * * * is appropriate and effective.

Another case supporting our position, but cited by appellant at page 46 of its statement, is that of *Missouri Pacific Railway* v. *Kansas*, 216 U. S. 262, 54 L. Ed. 472.

In that case "the order of the State Commission directed the putting in operation of a passenger train service between Madison, Kansas, and the Missouri-Kansas State line, on what is known as the Madison branch of the Missouri Pacific Railway Company. The branch road in question lies between Madison, Kansas, and Monteith Junction, Missouri. From Madison to the State line is 89 miles, and from the State line to Monteith Junction is 19 miles, the total distance between the two terminal points being 108 miles. At Monteith Junction the Madison branch intersects with the Joplin line of the Missouri Pacific, by means of which connection is made with Kansas City and other points. There being no terminal facilities at Monteith Junction, the trains operated on the Madison branch do not remain over at the junction, but run as far as Butler station, 3 miles distant on the Joplin line, where terminal facilities exist."

This Court there said:

> "And this brings us to consider the several reasons relied upon to establish, first that the order made by the railroad commission was so arbitrary and unreasonable as to cause it to be void for want of power; or second that the order was void because its necessary operation was to place a direct burden upon Interstate Commerce."

As to the first proposition, the contention was made that the order was arbitrary because the service could not be rendered without a pecuniary loss and the court held that the mere incurring of a loss from the performance of a duty does not, in and of itself, necessarily give rights to the conclusion of unreasonableness, and the court cited and quoted at length from the case of *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.*, 176 Ill. 512.

The contention was, also, made that the order was unreasonable because it directed the movement of passenger train directed to be run to the state line, where it is said there were no terminal facilities and *that it would have to run the train to a point outside of the state.*

The contention was also made that the order was a direct burden upon Interstate Commerce. Answering that contention the court said:

> "The contention that a burden was imposed upon interstate commerce by causing the train to stop at the state line, where there were no terminal facilities, but in a disguised form reiterates the complaint which we have already disposed of, that the order, because of the direction to stop at the state line, was so arbitrary and unreasonable as to be void. The order cannot be said to be an unreasonable exertion of authority, because the power manifested was made operative to the limit of the right to do so. Besides, the proposition erroneously assumes that the effect of the order is to direct the stoppage at the state line of an inter-

state train, when, in fact, the order does not deal with an interstate train, or put any burden upon such train, but simply requires the operating within the state of a local train, the duty to operate which arises from a charter obligation. It is said that, as the state line may be but a mere cornfield, the great expense must result to the railway from establishing necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by the order, *not only to the state line, but 20 miles beyond*, to Butler, on the Joplin line, where terminal facilities exist. From these assumptions, it is insisted, that the order must be construed according to its necessary effect, and therefore must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train, not only within the state of Kansas, but beyond its borders. But under the hypothesis upon which the contention rests, *the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. Atlantic Coast Line R. Co.* v. *Wharton*, 207 U. S. 328, 52 L. Ed. 230, 28 Sup. Ct. Rep. 121." (Italics ours.)

The court also referred to the *Atlantic Coast Line R. Co.* v. *North Carolina Corp. Commission* case, and said:

"The elementary proposition that railroads, from the public nature of the business by them carried on, and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly, by the legislative authority, or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

This court then affirmed the decision of the lower court. This case fully supports the contention of the appellees because of the contention made by the appellant that cabooses as a practical matter will have to be run into the State of Missouri. In our present case the taking of cabooses into Missouri (although our contention is that cabooses on the bridge runs could be changed at the cross overs on the bridges which are in Illinois), would be at the election of the appellant, and as the court said: "Even if the performance of duty of furnishing local facilities in some respects affected Interstate Commerce it does not necessarily follow that thereby a direct burden on Interstate Commerce would be imposed."

In view of these authorities it is respectfully submitted that the order of the Illinois Commerce Commission was a reasonable police regulation for the protection of the health, lives and safety of persons within the confines of the State of Illinois and that its effect, if any, upon interstate commerce was indirect and incidental.

II.

The order of the Illinois Commerce Commission is not repugnant to or in conflict with any action taken by the Federal Congress.

Under Point C, appellant contends that the State of Illinois is without power to require cabooses to be furnished on its trains within its confines because the Congress has taken charge of the entire field of cabooses, although appellant impliedly admits that Congress has *not* specifically legislated respecting the *furnishing* of such cabooses.

Of course, it is well established, as appellant contends, that *if* Congress has purported to take charge of the entire field to the exclusion of the States, they are thereafter without power to legislate within that field.

It is our contention, however, that Congress has not attempted or even purported to take charge of this field, although it has legislated as to certain isolated subject matters within the field. It is our further contention that the order of the Illinois Commerce Commission is not in conflict with any action thus far taken by the Congress, and is therefore entirely valid.

Appellant's principal contention is that the furnishing of cabooses is a "working condition" and that this field was taken over by Congress in its enactment of the Railway Labor Act, and the Interstate Commerce Act.

Both of these contentions are dealt with at length and disposed of adversely to appellant's position in the case of *Missouri Pacific Railroad Co.* v. *Norwood*, 283 U. S. 249, 70 L. Ed. 1010.

In that case two Arkansas statutes, both regulating the number of men to be used in the crews of trains operated within the State of Arkansas (commonly known as Full Crew Laws) were involved. In earlier cases, these two State acts had been assailed as violating the commerce clause of the Federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This Court, in the cases of *Chicago, R. I. and Pac. Ry.* v. *Arkansas*, 219 U. S. 453, 459, 465, affirming 86 Ark. 412, 111 S. W. 456, and of *St. Louis, I. M. & S. Ry. Co.* v. *Arkansas*, 240 U. S. 518, affirming 114 Ark. 486, 170 S. W. 580, has sustained the validity of the Acts in question as regarded these provisions of the Federal Constitution as amended.

In speaking of its previous holdings in these two cases, the Court, in the later *Missouri Pacific* case, said, at page 252:

> "The court held that the Act of 1907 is not a regulation of interstate commerce and that upon its face it must be taken as having been enacted in aid of, and for the protection of those engaged in, such commerce.

> It said that Congress might have taken entire charge of the subject, but that it had not done so and had not enacted regulations in respect of the number of employees to whom might be committed the management of interstate trains and that until it does the statutes of the State, not in their nature arbitrary, must control. The court found that, while under the evidence there was admittedly room for controversy as to whether the statute was necessary, it could not be said that it was so unreasonable as to justify the court in adjudging it an arbitrary exercise of power. And it held that, being applicable alike to all belonging to the same class, there was no basis for the contention that it denied the company equal protection of the laws. The principles governing that decision were followed in the later case, decided in 1916, which upheld the Act of 1913. Both Acts were sustained as valid exertions of police power for the promotion of safety of employees and others."

This Court, in the cited *Missouri Pacific* case, sets forth the railroad's contentions to the effect that these two Arkansas statutes had been rendered in conflict with and repugnant to Federal law by virtue of the subsequent enactment by Congress of the Interstate Commerce Act and the Railway Labor Act in the following language set forth at pages 252 and 253 of 283 U. S.:

> "The plaintiff says that, since these decisions, Congress has occupied the field and has delegated to the Commission and Labor Board full authority over the subject and that the state laws under consideration are repugnant to the comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act as amended and conflict with sections 1 (10) and (21), 13, 15 and 15a thereof and with the spirit of the Railway Labor Act of 1926."

The Court, at page 256, states the problems thus before it in the following language:

"Has Congress prescribed, or authorized the Interstate Commerce Commission to regulate, the number of brakemen to be employed for the operation of freight trains or the number of helpers to be included in switching crews?"

This Court in overruling the railroad's contentions and in sustaining the validity of the Acts in question, concludes, at pages 256 to 258, as follows:

"In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews. *Reid* v. *Colorado*, 187 U. S. 137, 148. *Savage* v. *Jones*, 225 U. S. 501, 533. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611. Plaintiff, while not claiming the Interstate Commerce Act in terms purports to cover that subject, insists that the Act does give the Commission jurisdiction over freight train and switching crews and so excludes the States from that field. It calls attention to a number of provisions of the Act and maintains that under them the Commission is empowered to regulate the 'practice' of carriers in respect to the 'supply of trains' to be provided by any carrier. But, assuming that the Act does so authorize regulation in respect of such practice and supply, it is clear that the delegation of power would not include the regulation of the number of brakemen or helpers. The act uses the word 'practice' in connection with the fixing of rates to be charged and prescribing of service to be rendered by the carriers, but these matters differ widely in kind from the subject covered by the Arkansas laws. That word is deemed to apply only to acts or things belonging to the same class as those meant by the words of the law that are associated with it. *Baltimore & O. R. Co.* v. *United States*, 277 U. S. 291, 300. The Act does not use that word in respect of any subject that reasonably may be thought similar to or classified with the regulation of the number of men to be employed in

such crews. And it is also clear that there is nothing in the phrase 'supply of trains' or in the purpose of the Act to suggest that by it Congress intended to supersede state laws like those under consideration. The plaintiff further supports its contention by the claim that the Commission is authorized to regulate the expenditures of carriers. That claim is based on the provisions of the Act empowering the Commission to regulate rates to be charged and divisions of joint rates and to ascertain rate levels that will yield the fair return provided for. But manifestly there is no similarity between determining what items of expense properly are to be taken into account in calculations made for such purposes and in the prescribing of the number of employees or the compensation to be paid them. We think it very clear that Congress has not prescribed or empowered the Commission to fix the number of men to be employed in train or switching crews.

"No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration."

In the said case, the Court, at page 255, has the following to say regarding the dangers which the said Acts were designed to obviate:

"There is no showing that the dangers against which these laws were intended to safeguard employees and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described. And, for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews. * * *"

We submit that the cited case completely disposes of all of the appellant's contentions here to the effect that the

order in question is such as to be in conflict with or repugnant to any action taken by the Congress.

A very recent (January 11, 1941) case dealing with the general subject of conflict between State action and the action of the Federal government respecting interstate commerce is the case of *Missouri-Kansas-Texas Railroad Co.* v. *Williamson*, 36 Fed. Supp. 607.

There an action was brought by a railroad company against the Attorney General of the State of Oklahoma to enjoin an Oklahoma statute limiting the length of trains within that State. It was contended that this statute burdened interstate commerce, violated the Fourteenth Amendment and conflicted with Federal action in this field.

In holding that regulation of the length of trains was in the interests of public safety, and that the Act did not violate any Constitutional provision nor conflict with any action taken by the Congress, the Court, at page 615, said:

> "But the intent of Congress to exert its superior authority and thus exclude or supersede state legislation concerning the same matter is not to be lightly inferred. It must be fairly manifested. *Reid* v. *Colorado*, 187 U. S. 137, 148, 23 S. Ct. 92, 47 L. Ed. 108; *Savage* v. *Jones*, 225 U. S. 501, 533, 32 S. Ct. 715, 56 L. Ed. 1182; *Atlantic Coast Line Railroad Co.* v. *Georgia*, *supra*; *Southern Railway Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 446, 35 S. Ct. 304, 59 L. Ed. 661; *Illinois Central Railroad Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510, 38 S. Ct. 170, 62 L. Ed. 425; *Napier* v. *Atlantic Coast Line Railroad Co.*, 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432; *Atchison, Topeka & Santa Fe Railway Co.* v. *Railroad Commission*, 283 U. S. 380, 392, 393, 51 S. Ct. 553, 75 L. Ed. 1128; *Gilvary* v. *Cuyahoga Valley Railway Co.*, 292 U. S. 57, 54 S. Ct. 573, 78 L. Ed. 1123; c/f *Missouri, Kansas & Texas Railway Co.* v. *Haber*, 169 U. S. 613, 623, 18 S. Ct. 488, 42 L. Ed. 878. And it is within the power of Congress to limit its regulation to only part of a given

field, thus leaving the remainder open to action by the state. *Southern Railway Co.* v. *Railroad Commission of Indiana, supra; Gilvary* v. *Cuyahoga Valley Railroad Co., supra; c/f Napier* v. *Atlantic Coast Line Railroad Co., supra.*

"The acts of Congress relied upon fail to make specific reference to the length of trains as an element of safety, and it is not contended that the Interstate Commerce Commission has acted or asserted its authority to act in respect of the matter under the powers which Congress has delegated to it. True, some if not all of the statutes concern themselves with various aspects of safety in the operation of trains. But, fairly construed, they do not contain any provision from which it can be reasonably implied that Congress intended to exert the paramount character of its authority in relation to the length of trains in such manner as to exclude or supersede state action. And until an intent to exercise such superior authority has been indicated, the state is free to legislate in the exertion of its police power. Compare, *Atlantic Coast Line Railroad Co.* v. *Georgia, supra; Vandalia Railroad Co.* v. *Public Service Commission*, 242 U. S. 255, 37 S. Ct. 93, 61 L. Ed. 276; *Gilvary* v. *Cuyahoga Valley Railway Co., supra.*"

Although appellant's counsel also mentions the car service provision, the Boiler Inspection Act, the Power Brake provision of the Safety Appliance Act, etc., he does not contend that the order in question actually conflicts with any of these specific provisions.

Counsel's statement to the effect that this Court, in *Penn. R. R. Co.* v. *Public Service Com.*, 250 U. S. 566, *held* that Congress has taken charge, not only of the details of the construction of cabooses, but also of the question of whether they shall be carried on trains at all, is absolutely without support in that or any other case to our knowledge.

Counsel's next statement that the furnishing of cabooses has always been treated as a "working condition" is with-

out support in the record, as we have already pointed out in our "Corrections in Appellant's Statement of Facts."

Appellant also contends that the order conflicts with the powers granted the Interstate Commerce Commission because the railroad may have to issue securities to finance the purchase of the cabooses in question. There is no evidence in the record to show that the appellant would have to borrow any sums of money to comply with the order, or issue any evidence of indebtedness which would have to be submitted to the Interstate Commerce Commission for approval. Furthermore, as hereinafter shown, the actual cost of furnishing the caboose is comparatively nominal.

But irrespective of this fact, the Transportation Act has no application to a situation of this kind, as evidenced by the very cases relied upon by appellant.

In *Railroad Commissioner* v. *Southern Pacific Company*, 264 U. S. 331, 68 L. Ed. 713, relied upon by counsel, the Railroad Commission of California had required certain railroads to build an interstate union depot for the City of Los Angeles. In order to comply the railroads would have been required to extend their lines and remove certain other tracks in order to properly connect with the Union depot. The Supreme Court called attention to the fact that the order there involved required the abandonment of available sites, the extension of main lines and terminals and alterations costing from $25,000,000 to $45,000,000.

The Supreme Court held that the Transportation Act did not prevent the state commission from making reasonable regulations which did not involve abandonment of sites, extensions of main lines and material changes in the lines of the carriers.

The court said, page 345:

> "It may well be that a mere relocation of a main track of an interstate carrier which does not involve a real addition to, or abandonment of, main tracks and

terminals, or a substantial change in destination, does not come within Pars. 18 to 21. One might, too, readily conceive of railroad crossings or connections of interstate carriers in which the exercise by a state commission of the power to direct the construction of merely local union stations or terminals without extensions of main tracks and substantial capital outlay should be regarded an ordinary exercise of the police power of the state for the public convenience, and would not trench upon the power and supervision of the Interstate Commerce Commission in securing proper regulation of an interchange of interstate traffic or passengers. *Only a lawful order of the Interstate Commerce Commission would raise a question of the power of a state commission* in such cases, as the proviso of p. 17, Chap. 402, of the Transportation Act, shows:

> "*That nothing in this act shall impair or affect the right of a state in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under* the provisions of this act." (Italics ours.)

It was further contended in that case that the order of the state commission involved such a heavy burden in the erection of a new union station and the main track changes and extensions and other accessories which would require the three railways involved to issue new capital securities, and this could not be done without the approval of the Interstate Commerce Commission.

The court, however, said at page 347:

> "To be sure, this provision *only becomes operative when securities have to be issued, and would not, of itself, prevent action by a state commission until such securities are seen to be necessary* . . ."

We submit that there is no evidence in the record in any wise showing that appellant will be required to issue any securities by reason of the provisions of the order of the Illinois Commerce Commission, hence the action of the state commission was not in any wise prevented by the provisions of the Transportation Act.

We respectfully submit that Congress has not invaded the field and has in no wise divested the states of their inherent power to protect and safeguard their inhabitants.

Even had Congress enacted a statute conferring regulatory powers upon a federal agency this would not, in itself, nullify the authority of the states to protect and safeguard their inhabitants under the police power. Eicholz v. *Public Service Commission of Missouri*, 306 U. S. 268; *Welch* v. *New Hampshire*, 306 U. S. 79; *Kelly* v. *Washington*, 302 U. S. 1; *Northwestern Bell Telephone Company* v. *Nebraska Railroad Commission*, 297 U. S. 471.

The *Northwestern Bell Telephone Company* v. *Nebraska Railroad Commission*, 297 U. S. 471, case involves an appeal from a judgment of the Supreme Court of Nebraska affirming an order of the Railroad Commission of that State directing the telephone company to use for purposes of accounting a depreciation rate fixed by the state commission. The company contended the commission's order was void as in conflict with the Interstate Commerce Act, as amended by the Transportation Act, which conferred upon the Interstate Commerce Commission authority to fix depreciation rates.

It should be noted specific regulatory authority was conferred upon a federal agency to do the identical thing which the state agency was empowered to do. In sustaining the power of the state commission the court said:

> "Both the language of the statute already quoted, and the nature of its subject matter indicate that it contemplated no restriction of state control over de-

preciation rates until the Interstate Commerce Commission had prescribed its own rates. State commissions were not deprived of power to fix rates for intrastate telephone service, in determining which rates of depreciation chargeable to operating expenses play an important part. See *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 78 L. Ed. 1182, 54 S. Ct. 658. The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the Commission would be prepared to act. It cannot be supposed that Congress intended by the amendment to Chap. 20 (5) to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates. * * * The Commission has thus prescribed no depreciation rates as required by Chap. 20 (5). *No* exertion of federal authority, through the Interstate Commerce Act, Chap. 20 (5), (6), (7), the order of the Commission or otherwise, forbids the making of entries in appellant's accounts or the doing of anything that is by the state commission's order directed to be done. Pending action by the Communications Commission establishing depreciation rates for telephone companies, state control over such rates remains unimpaired." (Italics supplied.)

In *Kelly* v. *Washington*, 302 U. S. 1, the Supreme Court of the United States sustained the statutes of the State of Washington providing for the regulation of tug boats over navigable waters of the United States, notwithstanding numerous federal statutes also providing for the inspection of various kinds of boats and vessels. In its opinion the Court stated at pages 9 and 10:

"Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to

their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases* (*Simpson* v. *Shepard*) 230 U. S. 352, 402, 57 L. Ed. 1511, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann Cas. 1916A, 18. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, *is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'.*" (Cases cited.) (Italics supplied.)

In the case of *Eichholz* v. *Public Service Commission of Missouri*, 306 U. S. 268, the Missouri Public Service Commission canceled a certificate of an interstate operator for failure to comply with certain regulations of the State. At the very moment the interstate certificate was canceled the trucking company had applied to the Interstate Commerce Commission for an interstate permit under the Federal Motor Carrier Act. The Supreme Court sustained the action of the State commission and said (p. 273):

> "When the commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded."

And at page 274 the Court said:

> "We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the state is free to act in order to protect its legitimate interests even though interstate commerce is directly affected."

In the case of *Welch* v. *New Hampshire*, 306 U. S. 79, the Supreme Court of the United States passed upon the validity of a statute of the State of New Hampshire which provided for the control of the hours of service of drivers of motor carriers. It was contended that the provisions of the New Hampshire Act were superseded by the Federal Motor Carrier Act, 1935, and regulations prescribed under it by the Interstate Commerce Commission. Under the provisions of the Act the New Hampshire Commission had suspended a certificate of the appellant for failure to comply with its orders governing the hours of service of its drivers.

In sustaining the order of the New Hampshire Commission (entered after the enactment of the Federal Act, but before the Interstate Commerce Commission had adopted rules and regulations under it), the Court stated at pages 84 and 85:

> "The sole question is whether Congress intended that from the time of the federal enactment until effective action by the commission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in interstate commerce. Our decisions provide no formula for discovering implied effect of federal statutes upon state measures as that under consideration. * * * The rule applicable is clearly stated in *Illinois C. R. Co.* v. *State Pub. Utilities Commission*, 245 U. S. 403, 510, 62 L. Ed. 425, 38 S. Ct. 170, P. U. R. 1918C, 279: 'In construing

federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as its purpose to do is clearly manifested.' We have frequently applied that principle." (Cases cited.)

In view of the facts in this case and the legal principles applicable thereto, we respectfully submit that Congress has not taken over the regulation of furnishing cabooses and that the order of the Illinois Commerce Commission is not repugnant to or in conflict with any action taken by the Federal Congress.

III.

The expense to which appellant will be put in order to comply with the Commission's order is not so exorbitant, when compared with the obvious benefits to accrue therefrom, as to deprive appellant of its property without due process of law.

Under Point D, appellant contends that the order of the Illinois Commerce Commission is invalid in that the expense of compliance therewith will be so exorbitant, when compared with the benefits to accrue therefrom, as to deprive appellant of its property without due process of law in violation of the 14th Amendment, to the Federal Constitution.

Of course we have no quarrel with the general principles, sustained by the cases cited by appellant, that a State cannot, under the guise of the police power, pass any arbitrary or unreasonable law in violation of the constitutional limitations; or that

"a strong public desire to improve the public conditions is not enough to warrant achieving the desire by a

> shorter cut than the constitutional way of paying for the change."

or that

> "whether this is done with or without due process of law depends upon the special circumstances."

This, however, does not in any wise minimize the power and duty of the State to act under its police powers subject to such limitations for the protection of life, health and safety of its inhabitants.

As the Supreme Court of the United States aptly said, in *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U. S. 613, cited by appellant, referring to the police power of a State:

> "It is the governmental power of self-protection and permits reasonable regulations of rights and property in particulars essential to the preservation of the community from injury."

We submit that the order in question is reasonable and necessary to the preservation of the life, health and safety of the trainmen and the public and does not violate any of the constitutional limitations.

A careful examination of the numerous cases cited by counsel for appellant fails to disclose anything to the contrary. Many of them involved different facts and therefore are not applicable to this case. In cases where the facts were analogous we submit they fully sustain our position.

In determining whether the order entered by the Illinois Commerce Commission is reasonable or arbitrary or in violation of the due process clause, it becomes necessary to examine the facts and circumstances in this case at some length.

In the first place, let us refer to the evidence of the Illinois Commerce Commission's expert.

Mr. R. B. Thomas testified that he was employed as Chief Railroad Inspector by the Illinois Commerce Commission for six years; that he was a high school graduate, graduated from the Michigan College of Mines, with the degree of Bachelor of Mines; that he had about eight years experience with railroads, that is railroad construction, and three years in highway construction; that in his present capacity he has had occasion to make investigations and take photographs, make reports and present evidence before the Commission; and had occasion to observe and make studies with reference to switching operations and transfer runs: That he was familiar with the preparation and interpretation of blue prints and plans; that he prepared approximately 1,000 plans and many thousands of blue prints. That he took thousands of photographs and interpreted them. That he took photographs in connection with his investigation in the present case. That he has had occasion to prepare estimates of cost of railroad facilities. It is interesting to note how thoroughly Mr. Thomas prepared his reports, as shown under the Commission's Exhibits 1, 2 and 3.

It should be noted that counsel for appellant never questioned the qualifications of this expert at the trial of this cause (Tr. 2-120).

Mr. Thomas testified that he spent between ten and fifteen days in the yards in making the investigation with reference to his first report, Commission's Exhibit 1. It must also be borne in mind that this expert used "caboose handling time" in computing the figures in the reports and in estimating the crew's wages, and testified that the actual delay time would be considerably less. Caboose handling time is all of the time consumed in the handling of the caboose. That is to say, an engine picks up a caboose, runs around a train, couples the caboose on a train, returns and couples

to the head end of the train. If it took 11 minutes to make that move, that would be handling time. The caboose delay time "might be less because while the engine was picking up the caboose and coupling the same and returning, other delays might have occurred during that 11 minutes, and consequently the caboose handling time would not always be a complete delay." In other words, if no caboose were used, there might be a delay of 8 minutes because of the coupling of the air or other things that had to be done so that the actual caboose delay time therefore would only be 3 minutes, though the expert charged the entire 11 minutes to caboose time (Tr. 2-126).

Actual cabooses were used in the test runs (Tr. 2-126). The reports dealt with clearances, description of shelter cab or caboose, flagging equipmment and the position of the rear brakeman or switchman, with questions of safety and comfort (Tr. 2-122). On cross-examination by counsel for appellant, Mr. Thomas further testified that if they had had the use of many cabooses instead of the one used, one-third of the actual time could be saved, namely, time shown on page 22 of the report as T—— $4,828.32, would be reduced approximately one-third (Tr. 2-129).

Mr. Thomas further testified that the maximum time shown in the report was based upon allowing extra time for one contingency or another, such as a yard or track being blocked (not caused by the caboose), and that it was not based on actual clock time. It was simply a guess (Tr. 2-129).

Mr. Thomas' initial investigation covered the C. D. Yard (Tr. 2-121). Mr. Thomas then continued the original investigation to cover Madison Yard and Wiggins No. 2 Yard, and the runs originating in those yards and moving to points within Illinois, introduced as Exhibit 2 (Tr. 2-131). Mr. Thomas then continued his investigation to cover the third

section of his report, which was the Eads bridge and Merchants bridge within the confines of the State of Illinois (Tr. 2-136). The report covers various photographs showing physical structures, clearances, surroundings, transfer moves, location and manner in which the switchmen ride those runs on the Eads and Merchants bridges. He also gives a summary of the number of cabooses covered by the report, also the amount of crew wages for actual crew handling time (Tr. 2-138).

In discussing the operating expense which he said would apply to 2¼ times the crew wage, it did not necessarily mean that all of the operating expense was an added expense, because it was reasonable to assume another president would not be required, nor another yard master, or an additional interlocking man, as the services of those men were already included in other operating expense; that the added expense would be the coal, water and oil that is required for the movement of the caboose and the maintenance of the caboose, and that the approximate amount of 2¼ times the crew wages as operating expense simply meant that there would be a paper shift or a record shift of the allocation of various costs that were used in making up the operating expense (Tr. 2-135).

Mr. Thomas testified that there were two cross overs on the approach to the Eads bridge in Illinois (Tr. 2-141), and Mr. Charles Jenkins testified (Tr. 2-28) that there was an approach to the Merchants bridge in Illinois, which was never rebutted.

Mr. Thomas testified that in photograph #2 (Tr. 2-235), the man is standing on top of a drawbar and has a hold of the ladder or brake staff of the car. There is a hazard in standing there, and he then referred to a detail of the drawbar, the footing and the hand-holds, and the position in which the man has to stand when riding in such a position.

The method in which he has to secure himself is not very good, and the footing that he has is not safe, and these hazards or dangers could be eliminated by providing a caboose for the man to ride in (Tr. 2-141).

Mr. Thomas goes into detail concerning the numerous vertical and horizontal insufficient clearances and equipment used on the bridges and testified to the hazards and unsafe conditions under which the men were compelled to operate. As an illustration he selected the last car which was 15 feet in height and from the diagram of the situation shown on the Eads bridge he found the vertical clearances to be 16' 2", so that the distance between the top of the running board and the fixed obstruction is 1' 2". The distance of 1' 2" is hardly sufficient room for a switchman to stand on the top of this car. *Hence the need of a caboose to safeguard the very life of the switchman.*

He further mentions that taking into consideration the smallest car that was observed at that point, which was 12' 10" in height, the clear distance between the running board and the fixed obstruction was 3' 4". The distance of 3' 4" is hardly sufficient room for a switchman to stand on the top of even the smallest car. *Hence the need of a caboose.*

He further testified that taking the narrowest car that was observed, which was 10' in width, one-half of the width of the car is 5 feet and it will extend 5 feet each way from the center line of the track. Deducting 5 feet or one-half of the width of the car from the distance to the north of the north track, which is 6' 5¾", we have 1' 5¾" clearance between the side of the car and the fixed obstruction. The distance of 1' 5¾" clearance between the side of the car and the fixed obstruction is hardly enough room for the switchman to stand on the side of the car. *Hence the need for a caboose.*

He further testified that taking the widest car observed, which was 10' 10", the distance will be reduced by 5 inches and the clear distance will then only be 1' 3¼". The distance of 1' 3¼" is hardly sufficient room for the switchman to stand on the side of that car. *Hence the need of a caboose* (Tr. 2-145).

He testified in detail about the insufficient clearances and also mentioned that the clearances did not take into account any sway or rocking of the cars that occurs during the time the cars are in motion, which appeared to be approximately 2 inches of sway or rocking of the cars at the rate of speed those trains were being operated (Tr. 2-146). It should be borne in mind that Mr. Thomas' testimony was never rebutted except for a general denial.

He further testified that the clearances were inadequate and insufficient to guard the safety of the switchmen (Tr. 2-147). The switchmen were then compelled to ride on the rear drawbar of the car, as will be noted from examination of the photographs showing the hazards and dangers (Tr. 2-255, 257, 258, etc.). The insufficient clearances can be observed from the examination of the photographs (Tr. 2-256, 258, 260, 261, etc.).

The record discloses without contradiction that at every test made there were four men checking: a member of the Brotherhood, Mr. Butler (assistant to Mr. Thomas), Mr. Thomas, *and an official* of the Railroad (Tr. 1-201).

The evidence clearly shows that on runs other than the bridge runs the rear switchman was compelled to ride the drawbar at the trailing end of the rear car. If the end of the car on which he was riding happened to be the end that was provided with a brake staff, the switchman would grasp it as a means to secure himself in place, and if not, he would reach farther toward the side of the car in order to reach the end ladder or hand-holds (Tr. 2-227).

With the use of a caboose the flagman can take his position in such caboose during the course of interchange or transfer operations, which would preclude the necessity of his riding on the drawbar, top or side of the rear car (Tr. 2-227).

The accommodations provided by caboose or shelter car include heat, shelter from the elements, a place to store flagging and other equipment, lunches, wearing apparel, and the like (Tr. 2-227).

In the summary of Mr. Thomas' report it appears that the annual crew wages for handling cabooses would amount to $27,777.22 (Tr. 2-266); that the number of cabooses required would be 36 (Tr. 2-266) at a cost of $1,233.69 each (Tr. 2-210), or a total of approximately $44,000.00.

It should be noted that the cost per caboose at $1,233.69 is not the figure estimated by the Commission's Expert, but is the cost as estimated by the appellant itself. (Tr. 2-241).

As to caboose delay time for round trips, the record shows conclusively, from actual tests made by the Commission's Expert, *in conjunction with an official of the railroad,* that the said delay time was nothing in one instance, two minutes in two other cases, eight minutes in one case, ten minutes in another, and seventeen minutes in a further one (Tr. 2-224), and that as to the other runs, the time was practically the same (Tr. 2-246, 247, 264).

The actual cost of the caboose was given by the railroad itself, and caboose time delay was checked by an official of the railroad on all tests, and the crew wages are known to the officials of appellant. The testimony of Mr. Thomas was not refuted and Mr. Thomas was not even cross-examined on these points.

Now let us see where and how Mr. Davis, superintendent of the appellant, got his figures of $400,000.00, divided into $150,000.00 for new cabooses and $250,000.00 on account

of added expense due to delays, etc. Mr. Davis in a general way testified to a 40-minute round trip delay as against the Commission's Expert's actual test made in conjunction with an official of the appellant, showing the delay to be from nothing in one instance and then from two minutes to seventeen minutes in other instances. He stated that this delay would cost $10.00 each round trip and that if cabooses were granted the cost for the first year would be the greatest, $400,000.00. That is all the testimony in this connection and was made after objection by counsel as follows:

> "Mr. Schwarzbach: I object to that as being a conclusion. There is no foundation laid for it" (Tr. 2-114).

There was absolutely no basis for the 40-minute delay or cost of $10.00 per run.

Counsel for appellant would have us believe this kind of evidence as against the testimony of the Commission's Expert whose tests were *at all times* made in conjunction with an official of appellee. Mr. Davis admitted (Tr. 2-197) that there was an official of the Terminal with Mr. Thomas at all times when the tests were made and stated that Mr. J. A. Matheson, Jr., was the official who made all the tests with Mr. Thomas and that a report of the test runs was made to appellee's office.

Mr. Davis' testimony is based upon hearsay as illustrated when he said (Tr. 2-198):

> "When I say there is a delay of one hour in the Pennsylvania yard, I do not know that of my own knowledge. I am taking their word for it."

Mr. Davis admitted that the appellant furnishes about 31 cabooses now, showing the necessity of cabooses to properly protect the safety of the switchmen (Tr. 2-113).

Mr. L. E. Knight, witness for appellant, who according to counse for appellant, corroborated Mr. Davis, admitted that he kept a record of every caboose put on and that he

timed everything from the time the engineer was riding until the work was completed (Tr. 2-194). Mr. L. E. Knight was very indefinite on the caboose delay, stating it would take 12, 15, maybe 20 minutes, then stated six to 12 minutes (Tr. 2-183, 184).

Mr. Walter H. Rolen, another witness for appellant, who is supposed to have corroborated Mr. Davis, on cross-examination changed his testimony by admitting that the only caboose delay would be the time the engine would require to get the caboose, take it and place it, and that coupling up the air brakes would not be charged to caboose delay (Tr. 2-175), and that it would take the engine three or four minutes to run both ways of a 45-car length (Tr. 2-176).

Mr. Leslie W. Cheatham, a switchman since May, 1920, testified to the various hazards from Madison yard to Granite City (all within Illinois); shoving down the railroad, which is very hazardous, as follows:

> "We shove down and cannot see. The head man cannot see the rear man or flagman. I have had cars break off and roll down and it was impossible to stop them. I have been on that run and had to run ahead of the cars to protect the public. We do not have air brakes and couplings on these runs all the time" (Tr. 2-34, 35).

He further testified that if they had a caboose on this run, with air brakes properly working, the rear man would be able to stop in case of emergency (Tr. 2-35). This is just one instance of the dangers not only to the switchman but to the public.

He further testified to other runs, showing various hazards including the insufficient vertical and horizontal clearances other than the bridge runs within the confines of the State of Illinois, the dangers of which could be eliminated by the use of a caboose (Tr. 2-35, 36).

The record is replete with testimony showing the various hazards and dangers incurred by the switchmen in the

performance of their duties and the necessity of cabooses to eliminate said hazards and dangers, including therein the insufficient vertical and horizontal clearances on all runs within yards in the State of Illinois and over the Eads and Merchants bridges within the confines of the State of Illinois.

Testimony along these lines was furnished by William O. Satterfield, a switchman for over 16 years and assigned to the C. D. yard (Tr. 2-45 to 59, inclusive). He testified that the clearances and other hazards, even those other than the bridge runs, could be eliminated by a caboose which would eliminate the hazards incurred by close clearances, of signals, bridge signals, etc., and would afford better protection in observing the train, in cutting off and throwing switches; that it would prevent the switchmen from being knocked off the top of the cars from insufficient clearances or when the train is making sudden stops or sudden starts; that it would afford protection in the event the trains break off on stiff inclines, for with a properly equipped caboose you would have the protection of air brakes; that it would afford the protection of being better able to do the work on account of inclement weather, such as sleet, snow and ice, which sometimes are on the grab irons of the cars or on the tops of the cars, when they have to get down to throw switches; that it would not be necessary to ride the drawbar, or on the sill where the drawbar is fastened onto the car, that being a dangerous position under any conditions of weather. It would allow the switchman to prevent anyone from running into the hind end of the train when you had to stop on curves where you would not be observed for long distances. Property equipment such as first aid could be carried in the caboose in case of emergency (Tr. 2-56, 57).

The evidence also shows that other railroads operating runs parallel with the respondent's and railroads using

some of the same tracks of the appellant operate with cabooses.

To the same effect as these other witnesses was the testimony of Fritz Rousch, a switchman for eighteen years (Tr. 2-71), John Cox, a switchman since 1925 (Tr. 2-72), George H. Cox, a switchman for sixteen years (Tr. 2-75), Thomas Strike, a switchman for twenty-one years (Tr. 2-81), William A. Bruce, a switchman for 49 years (Tr. 2-84), R. F. Blackman, roadman for 29 years (Tr. 2-85). It is interesting to note that the testimony of the appellant's witnesses was all general, whereas the testimony of expert witness and witnesses for the appellee was very specific and definite.

We respectfully submit that it is not only the accidents that have actually occurred that prove our contention, but the potential hazards and the dangers and hazards to which the men are and will continue to be subjected.

It has never been contended that appellant was insolvent or that the outlay of any sum for the purchase of additional cabooses would render it insolvent.

If appellant elects to operate freight trains and employs switchmen in connection therewith it cannot evade its duty imposed by law to furnish all reasonable means and methods to protect its crews against hazards, accidents and injuries.

The cost involved we submit is insignificant compared to the good achieved and to be achieved by the order entered by the Illinois Commerce Commission in providing for cabooses so as to avoid not only the accidents that occur but also to avoid the dangers and hazards to which the switchmen are subjected.

In view of the facts and circumstances of this case, it is respectfully submitted that the expense to which the appellant will be put in order to comply with the order of the Commission is not so exorbitant when compared

with the great benefits to accrue therefrom, as to deprive appellant of its property without due process of law.

Conclusion and Motion.

In view of the foregoing it is respectfully submitted that the only Federal questions raised by the appellant are not only without substance but have been repeatedly passed upon by this Court contrary to the appellant's position.

The appellees therefore pray that this Court either dismiss the said appeal for want of a substantial Federal question, or, in the alternative, that the judgment of the Supreme Court of the State of Illinois be affirmed by this Honorable Court at this stage of the proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 218

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, CHAIRMAN AND STATE LEGISLATIVE REPRESENTATIVE, AND ILLINOIS COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLEES.

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Appellant's statement of the case is in some particulars inaccurate and is, in the view of appellees, in other particulars inadequate. Appellees therefore make the following additional statement:

The Brotherhood of Railroad Trainmen is an organization representing trainmen and switchmen who are employed by the Terminal Railroad Association of St. Louis, Respondent (R. 18, 60). Appellant is an association which performs terminal services in the switching district of East St. Louis, Illinois, for and on behalf of its proprietary lines and other railroad companies desiring use of its facilities (R. 151). The corporate control of the Terminal Railroad Association is vested equally in each of the following railroad companies: The Alton Railroad Company; Baltimore & Ohio Southwestern Railroad Co.; Chicago & Eastern Illinois Railway; Chicago,

Burlington & Quincy Railroad Co.; Chicago, Rock Island & Pacific Railroad Co.; Cleveland, Cincinnati, Chicago & St. Louis Railway Co.; Illinois Central Railroad Co.; Louisville & Nashville Railroad Co.; Missouri, Kansas, Texas Railroad Co.; Missouri, Pacific Railroad Co.; Missouri Pacific Acct.; St. Louis Iron Mountain & Southern Railroad Co.; Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Co.; St. Louis-San Francisco Railway Co.; St. Louis Southwestern Railway Co.; Southern Railway Co.; and Wabash Railway Co.

Switchmen are assigned to particular crews. The switchmen make and break up trains in yards, switch industries, make deliveries from connections to the Terminal Railroad Association from through lines, make transfer runs from and to various yards of the Terminal Railroad Association and perform that work in the yards or industries required to make up trains and couple cars together. They see that the air brakes are coupled and in order on the train. When a train leaves the yard for a destination, the switchmen take their proper positions on the train, the rear man taking his position on the rear car of the train (R. 20). The rear man is required to ride the rear coupler of the car where overhead and side structures do not clear him on the top or side of the car (R. 20). He lines all switches back in a proper position when they have been used by his train and, in case of reverse movement, when a train is shoved, he is required to protect street and highway crossings to keep the public from being killed or injured. When shoving a train near or on private crossings, he is required to be on top of the rear car, unless prevented by overhead or side structures that do not clear the switchman (R. 20, 29).

The length of the trains in operation handled by trainmen on one trip vary from one to a hundred cars (R. 86, 99, 100, 101, 103).

A caboose or safety cab is a railroad car furnished for the housing of train crews and equipped for their safety. They are needed to avoid side and overhead structures which endanger the life and limb of the switchmen and to provide for them a safer place in case of derailment of the train or sudden jerking or sudden stops which would be likely to throw switchmen from the top, side or end of the car (R. 21). In case a train breaks in two, it is very dangerous for a man to be on the rear end of the train, as it is easy to be knocked off the top or end by a sudden jerk or stop (R. 22). It also protects the switchmen from the inclement weather in both winter and summer. During the winter months the hand-holds, drawbars and sill steps of cars are often covered with ice, making it difficult for the switchmen to get on top of a car and making it very easy for said switchmen to be jerked or bumped off (R. 22, 40, 60). He could discharge his duties from the interior of the caboose or from the steps outside the caboose (R. 60).

A caboose also provides a place for the switchmen to keep and carry their necessary flagging equipment, clothing such as rain clothes, coats, etc., and to carry their necessary first aid equipment and lunches and permit the lighting of red lanterns during inclement weather. It is also used to do such clerical work as is necessary when the train is en route (R. 21, 41). Switchmen can observe their train better while it is *en route* and watch the side of their train from a caboose. It is hazardous for a switchman on top of a car or on the end of a car to observe the side of his train (R. 22). A caboose is properly equipped with a whistle and a conductor's valve, an air brake, which permits the switchman on the rear end of the train to have practically the same control of the train that the engineer has with reference to stopping or sounding a warning signal on approaching a highway crossing, etc. (R. 22, 29.) He can perform all the necessary work better from the caboose

(R. 22). Where no caboose is provided, switchmen are required to carry their lunch in their pocket or tie it on the car if some suitable place can be found (R. 29).

A switchman can perform the necessary duties far better from a caboose in observing the running condition of his train, and in flagging and in getting off and on the rear end of his train, in moving motion, also in shoving or back up movements of trains (R. 22).

It is admitted that no cabooses or shelter cabs are provided by appellant for any of the crews working out of certain yards herein involved (R. 163). As to other yards, cabooses are furnished part of the year in some instances and in others all the year round (R. 180).

There are various transfer runs *within the confines of the State of Illinois* which go onto the Eads and Merchants Bridges which span the Mississippi River (R. 187). Most of the overhead and side clearances on these two bridges are insufficient to clear a switchman (R. 20, 188, 199).

Cabooses are not furnished on most of the transfer runs out of Madison Yard or CD Yard in Illinois moving onto these two bridges. Cabooses are furnished upon certain transfer runs originating in the Wiggins No. 2 Yard Illinois and moving onto the Merchants Bridge but only between October 15th and May 1st (R. 187).

At many points there exist numerous insufficient clearances for a switchman to ride the *top* of the rear car (R. 32, 34, 35, 38, 52); and the rules of the Terminal Railroad Association expressly provide that the switchmen must ride the top of the rear car (R. 32); although another rule provides that "riding on the inside of loaded open top cars is prohibited." (R. 141.) Some of these clearances are such that a switchman cannot ride the *side* of the car without being knocked off (R. 32, 34, 35, 36, 42, 52).

The testimony of one R. B. Thomas, Chief Railroad In-

spector for the Illinois Commerce Commission, discloses numerous insufficient vertical and horizontal clearances on various runs, including the runs onto the Eads and Merchants bridges. His reports contain photographs showing the switchmen riding on the rear drawbar of the last car of the train and also showing the various insufficient clearances (R. 100-104, 174-177, inclusive). His testimony clearly shows that the dangers and hazards in question could be eliminated by providing a caboose for the man to ride in (R. 101, 175).

Often the rear switchman rides the drawbar at the trailing end or the rear car. If the end of the car on which he was riding happens to be the end that was provided with a break staff, the switchman is required to grasp it as a means to secure himself in place. If no break staff is provided, he is required to reach further out towards the side of the car in order to reach the end ladder or other handholds. He is also required to brace himself against the end of the car to avoid being shaken off due to sudden stops and starts. Photographs showing a switchman in riding position and details of footing, etc., will be noted (R. 174, 175, 176, 177). Appellant admits a very serious accident on the Eads Bridge to a switchman, Mueller, who was riding on the rear drawbar, when he was jerked off the car and injured (R. 141).

In many instances the trains move up steep inclines fraught with danger. If cars break off, it is very difficult to stop such cars and to avoid loss of life of the public (R. 33, 36, 37). The evidence shows many unprotected crossings (R. 33, 36, 37).

In many instances, where these is no caboose, the switchman is required to stand on the top of the last car in the train while the train is shoving, facing sleet and snow and rain storms and wind. In such cases the switchmen are unable to see where they are going and are required in

many instances to turn their backs for shelter. If this is done, such switchmen cannot observe highway crossings or other dangerous points (R. 23).

In many instances the rear switchman or fore-switchman cannot see the head switchman (45 car lengths away) until the train gets onto a straight road (R. 25). In some instances it is necessary to shove a train without being able to see. Sometimes the cars break off and roll down and it is impossible to stop them by hand brake, in which case it is necessary for the switchman to run ahead of the cars to protect the public (R. 25). A caboose with air brakes properly working would enable the rear man to stop the train in case of such an emergency. A caboose is provided with a conductor's valve (R. 26), so that he can control back-up movements on his train with an air valve provided on the caboose for the purpose of setting the brakes. He can also, with the whistle that is provided on the caboose, warn the public at or near crossings (R. 60). The ability of a switchman using a caboose to stop the cars or warn an approaching train is far greater than it is when he is riding on a drawbar or on the top of a car (R. 60-61).

The evidence shows that other railroads operating runs parallel with the Respondent operate with cabooses; namely, the Pennsylvania, the run from Rose Lake to Madison Yards; the Illinois Central; the C. & E. I., Madison, Illinois, to East St. Louis, Illinois; the Rock Island Railroad, Madison Yard to East St. Louis, Illinois; the Chicago, Burlington & Quincy at Madison Yard and the C. T. Junction; the Illinois Central; the Big Four from East St. Louis, Illinois to Granite City, Illinois; the Alton Railroad out of Venice to various yards (R. 28).

The evidence also shows that various other railroads operating over the Respondent's tracks in East St. Louis, Illinois District and under substantially the same condi-

tions have the use of cabooses (R. 54, 58, 59, 84). As a switchman employed by the Illinois Central testified, "we take a caboose on any run we want a caboose on." (R. 59.)

At the conclusion of the hearings before the Commission, the Commission found that cabooses were necessary on the runs in question because of the operating hazards and dangers to the life, health and safety of the trainmen, employees and the general public and ordered the Appellant to furnish such cabooses (R. 12-13).

The Circuit Court's Order did not challenge the Commission's findings as to the necessity for cabooses but reversed the Commission's order solely on the ground that to order the use of cabooses on such runs as went onto the Eads and Merchants bridges constituted an interference with interstate commerce beyond the power of the Illinois Commerce Commission (R. 204).

An additional correction of appellant's statement should be made: Appellant's statement indicates that the record shows conclusively and without contradiction that it would be impossible to cut off or couple a caboose on the bridges in the middle of the river, so that as a practical matter the necessary effect of the Illinois Commerce Commission's order is to require the appellant to carry its cabooses across the river, and hence without the state of Illinois.

Although, as will appear from the argument, appellees do not deem it decisive or even important whether the compliance with the order requires the physical transportation of cars beyond the confines of the State of Illinois in the light of authorities cited by appellees to the effect that an interstate carrier may be required by state action to comply with orders respecting equipment or crews even though such equipment or crews are necessarily transported outside the state, we note that appellant's statement is in this respect insufficient, inadequate and rather misleading.

Counsel fails, for example, to point out that the evidence shows that on the approach to the Eads Bridge on the Illinois side there are two cross overs (R. 100), that on the approach to the Merchants Bridge on the Illinois side there is one cross over (R. 21), that it would be quite possible to add other cross overs on these bridges in the State of Illinois (R. 21), and that before the tracks enter the tunnel on the Missouri side there is an interval of some 500 feet (R. 77).

While it may well be that the *cheapest* and therefore *most practical* way to comply with the order in question would be to leave the caboose attached to a train after it had left Illinois going West, and to attach a caboose on an East bound train before leaving Missouri, it does not follow that the necessary effect of said order is to require compliance in the State of Missouri.

At page 11 of appellant's statement of the case, counsel say:

> "The furnishing of cabooses has always been considered a working condition and has been dealt with as such by appellants and its switchmen, and cabooses have always been since 1910 and are being furnished by reason of written contracts between the Brotherhoods and appellants (R. 82)."

This is inaccurate. The record in no wise sustains counsel's statement that the furnishing of cabooses has been considered a "working condition" and the balance of his statement is misleading in that it fails to make it clear that cabooses were furnished only on certain runs and at certain times of the season.

Counsel's statements, at page 270 of the record, respecting appellant's evidence as to the delays and costs to result from the order requiring cabooses fails to point out that the testimony in question was the purest kind of hearsay and that it was, in a large measure, based on information acquired by the witness second hand from vari-

ous railroad officials. For example, appellant's witness testified (R. 142):

> "When I say there is a delay of one hour in the Pennsylvania yard, I do not know that of my own knowledge. I am taking their word for it."

His estimate of a 40 minute delay and $10.00 cost per run was likewise without factual basis in the record, and his estimate of a $400,000 outlay for the first year was of the same incompetent character.

At page 270 of the record counsel briefly summarizes the testimony of the Commission's expert witness and says that his testimony was that

> "the initial cost of new cabooses would be $44,000 and the extra annual expense in wages about $62,000, but this estimate did not include anything except wages (Tr. 2-123)."

This is neither fair nor accurate. In the first place, his estimate for the cost of cabooses was *not* $44,000 *per year*. It was a *total investment* in new cabooses. In the second place this estimate was based on 36 new cabooses at a cost of $1,233.69 each (Tr. 2-266) which is the cost estimated not by appellees but by the appellant itself (R. 179). In the third place, the annual extra expense in wages for those handling the added cabooses was estimated at $27,777.22, not $62,000 (R. 201).

Counsel also fails to point out that these estimates given by the Commission's expert were not hearsay, but were the result of ten or fifteen days spent by the witness in appellant's yards riding the various cuts in company with railroad officials. (R. 87-89).

Furthermore, counsel's statement that the "delay would average 11 minutes per run" is not correct. The testimony was that the "handling time" would be 11 minutes per run, which would actually result in perhaps only 3 minutes "delay" per run (R. 90).

Counsel's next statement that

> "The Supreme Court of Illinois found that the delay on each run would be from eleven to forty minutes (Tr. 13),"

is likewise not correct. The nearest approach to such a statement in the opinion is to be found at page 412 of 379 Illinois, where the Court says:

> "The evidence before the commission as to the amount of time consumed was in conflict, ranging from eleven minutes to forty minutes per movement, although appellant (now appellee) concedes that some time is required to add a caboose to these cuts of cars."

Appellant's next statement to the effect that the rear switchman would be able to use the caboose only from one-sixth to one-eighth of his working period, that during the balance of his time he would be exposed to the same or additional hazards, and that the Supreme Court in its opinion so found is not correct and is not supported by the record.

With respect to the facts sustaining the Commission's order as a reasonable and proper "police power" measure to protect the lives and limbs of the trainmen and passengers, the statement is completely silent. In our opinion this is unfair and requires us to add such facts so as to have the true record before this court.

On page 13 of appellant's brief it is said that

> "the caboose would be used only by one employee out of five in each run."

This statement is not true for two reasons. In the first place, a crew consists of *three*, not *five* men (R. 221). In the second place, all of the men of the crew would use the caboose not only for the purpose of carrying equipment, but for the purpose of temporary shelter from the elements, even though all of them could not ride in it at all times. Appellant's statement (at page 13 of its brief)

that an employee could use the caboose only from one-sixth to one-eighth of the time that he worked is without support in the record.

Appellant further makes the statement (*Appellant's brief*, page 14) that the company's losses have been such as to make the order unreasonable and confiscatory.

Appellant's allusion to losses are during the "bad years" from 1929 to 1937. In 1939, however, the company (which is in reality operated as a facility for other railway companies and might perhaps be prudently operated at cost or even with capital contributions) earned over $700,000. In 1928, a year of industrial activity comparable to that of the year in which the order was entered, and to the period during which it was intended to operate, the company earned $1,134,000.

Moreover, these are the earnings of a company which was intended merely as a corporate instrumentality operating facilities for the use of proprietary railroads, whose earnings are not shown.

SUMMARY OF ARGUMENT.

I.

The regulation in question is a reasonable exercise of the state's police power and imposes no unconstitutional burden on interstate commerce.

(i)

Assuming that the order in question is not in conflict with applicable federal regulation, it must be sustained if it is a reasonable measure having for its purpose and legitimate object the preservation of life and health and the promotion of safety, even though it may be enforced with respect to interstate commerce.

Wickard v. *Filburn*, No. 39, October term, 1942, 11 L. W. 4011.

California v. *Thompson*, 313 U. S. 109.

Chicago, R. I. Pac. R. R. Co. v. *Arkansas*, 219 U. S. 453.

New York, N. H. & H. R. Co. v. *New York*, 165 U. S. 628.

Atlantic Coast Line R. R. Co. v. *Georgia*, 234 U. S. 280.

South Covington & C. St. Ry. Co. v. *Covington*, 237 U. S. 357.

Mo. Pac. Ry. Co. v. *Kansas*, 216 U. S. 262.

(ii)

The order in question is, upon a consideration of the particular factual complex in the instant case, inherently reasonable.

See *Argument*.

II.

Congress has not by affirmative action pre-empted the subject matter of the present order from the jurisdiction or powers of the State of Illinois.

Kelly v. *Washington*, 302 U. S. 1.

(i)

State action, if within the police power, is valid unless Congress has affirmatively excluded its exercise by acting directly and immediately upon the subject matter in question, so that the state action is repugnant to the federal action. Such power is not excluded merely because Congress has regulated a part of the field.

Mo. Pac. R. R. Co. v. *Norwood*, 283 U. S. 249.

Kelly v. *Washington*, 320 U. S. 1.

Northwestern Bell Teleph. Co. v. *Nebraska*, 297 U. S. 471.

Welsh v. *New Hampshire*, 306 U. S. 79.

(ii)

The present order is not in conflict with any applicable federal order or regulation.

The Railway Labor Act (U. S. C. A., Title 45, Supplement 236, *et seq.*).

The Interstate Commerce Act, Sec. 1, Pars. (10) through (17), and (21); Sec. 26 and Sec. 20 (a).

The Boiler Inspection Act, (45 U. S. C. A., page 78, Sec. 22, *et seq.*).

The Safety Appliance Act (45 U. S. C. A., Sec. 1, *et seq.*, page 3, *et seq.*).

Mo. Pac. R. R. Co. v. *Norwood*, 283 U. S. 249.

R. R. Comm. v. *Southern Pacific*, 264 U. S. 331.

Robinson v. *B. & O. R. R. Co.*, 222 U. S. 506.

City of Detroit v. *Wabash Refining Co.*, 223 Ill. App. 246.

Thompson v. *Missouri Pacific R. R. Co.*, 15 Fed. (2) 28 (C. C. A. 8th).

Penn. R. R. Co. v. *Public Service Commission*, 250 U. S. 566.

III.

The order does not deprive appellant of its property without due process of law.

C. B. & Q. R. R. Co. v. *Commerce Commission*, 364 Ill. 213.

Chesapeake & O. Ry. Co. v. *Pub. Ser. Comm.*, 242 U. S. 603.

Atl. Coast Line R. Co. v. *N. Car. Corp. Comm.*, 206 U. S. 1.

Mo. Pac. R. Co. v. *Kansas*, 216 U. S. 262.

Washington ex rel., Ore. R. & Nav. Co. v. *Fairchild*, 224 U. S. 510.

C. B. & Q. R. Co. v. *Railroad Comm.*, 237 U. S. 220.

Panhandle E. Pipe Line Co. v. *Comm.*, 294 U. S. 613.

N. Y., N. H. & H. Co. v. *New York*, 165 U. S. 628.

Atl. Coast Line Co. v. *Georgia*, 234 U. S. 280.

Penn. Coal Co. v. *Mahon*, 261 U. S. 393.

ARGUMENT.

Brief Introductory Statement.

Appellees' argument can, it is believed, be more clearly presented and more readily followed if, before developing in detail the points under which it is presented, we briefly indicate, without the consideration of authorities or extended comment, its essential substance and content.

Appellant argues first that the order is invalid because, as appellant asserts, "Congress has occupied the field" and next argues that, even if Congress has not occupied the field, the order is void because it "directly and unconstitutionally burdens interstate commerce." However, appellees conceive that the question of the state's power **in the absence** of federal action logically precedes the question whether that power has been superseded or abrogated by federal action. Accordingly we depart from the sequence of appellant's argument.

* * * * *

Appellees submit that appellant's argument is prepossessed by certain fundamental misconceptions as to the general constitutional principles applicable to this and similar cases. Although the classical idiom of the older opinions discussing cases such as the present one insisted upon a discrimination between "direct" and "indirect" burdens upon interstate commerce, it is clear that these terms early acquired highly sophisticated connotations; and that, as this court has said in the *Wickard case*, No. 59, October term, 1942, they were frequently used to

> "**state** rather than **reach** a result."

As this court observed in the *Wickard case*, the use of the term "direct" as opposed to "indirect"

> "of late * * * has been abandoned in cases dealing with federal power under the commerce clause."

Appellees contend that, whatever may have been the signification of the terms "direct" and "indirect" in the particular contexts in which they have frequently occurred, this court has consistently and, in the main, unerringly perceived a fundamental distinction between those instances of state action which not only affect interstate commerce, but which **have the regulation of interstate commerce, for the sake of such regulation, for their primary and immediate purpose**, on the one hand, and, on the other hand, those state regulations which may no less certainly influence interstate commerce but which **affect it only incidentally to the accomplishment of a purpose within the police power of the state.**

The **first** type of regulation, such as the levying of imposts, the fixing of rates and charges for interstate transportation and the like, is void even though the regulation is not inherently unreasonable and even though congress has not acted with respect to the subject matter.

The **second** type of regulation, such as measures intended to preserve health, promote safety, or protect property, is valid unless **either** (1) the burden that it lays upon interstate commerce is **unreasonable** in contemplation of the object sought to be attained, **or** (2) it is in conflict with an **actual exercise** of congressional power.

Under the first point of this argument, appellees contend that the order in question clearly had for its purpose and object the protection of health and the promotion of safety, not only of appellant's employees, but of the public; that its purpose was within the ambit of the police power; and that the order was not intrinsically unreasonable. Appellees do not, under their first point, deal with appellant's contention that congress has occupied the field.

* * * * *

Appellant likewise misprises the general principle governing the questions raised by the assertion that the order is in conflict with applicable federal statutes and regula-

tions. Appellant assumes that the mere fact that Congress has legislated, perhaps rather comprehensively, with respect to a given subject matter excludes state action. The true rule, as shown in the authorities considered under the second point of this brief, is that state action

> "is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts 'cannot be reconciled or consistently stand together,' " (*Kelly v. Washington*, 302 U. S. 101).

Under appellees' second point, appellees demonstrate that, notwithstanding appellant's argument to the contrary, congress has not occupied the field or so exerted its power as to exclude state action. In particular, it will be shown that the matter of cabooses on appellant's trains is not a mere working condition; that the regulation pertains not only to the health of appellant's employees, but to the safety of the public; and that the interstate commerce act has **expressly reserved** to the states power to enact regulations of the sort here in question.

Under the third point of appellees' argument, it will be very briefly pointed out that if appellees are correct in their first contention that the order does not unreasonably burden interstate commerce, *a fortiori* it is not so unreasonable as to amount to a confiscation of appellant's property without due process of law; and that appellant's contention that compliance with the order would be so costly as to amount to confiscation is without foundation in the record.

I.

The regulation in question is a reasonable exercise of the state's police power and imposes no unconstitutional burden on interstate commerce.

Under the present point appellees argue the following premises.

Appellees' major premise:

Assuming (as is shown under Point II of this argument, *post*) that the order in question is not in conflict with applicable federal regulation, it must be sustained if it is a reasonable measure having for its purpose and legitimate object the preservation of life and health and the promotion of safety, even though it may be enforced with respect to interstate commerce.

Appellees' minor premise:

Upon the facts in the instant case, the order is such a reasonable exercise of the state's police power as to be within the rule above stated as the major premise.

(i)

Assuming that the order in question is not in conflict with applicable federal regulation, it must be sustained if it is a reasonable measure having for its purpose and legitimate object the preservation of life and health and the promotion of safety, even though it may be enforced with respect to interstate commerce.

Appellees submit at the outset that it is clear, without, for the moment, considering any other questions that may be involved in this case, that the order in question may not be condemned as unconstitutional upon any theory that it is void merely because it imposes a burden upon interstate commerce and by characterizing that (supposed) burden as "direct."

In the **first** place, as appellant itself concedes by quoting at page 47 of its brief the language of this court in the *Wickard case* above cited, insistence upon any categorical distinction between "direct" and "indirect" burdens

> "has been abandoned in cases dealing with questions of federal power under the commerce clause."

In the **second** place, even if we follow appellant in its resort to the distinction between the terms "direct" and "indirect," although appellant itself not only concedes but

argues that this contrast in terms has been abandoned, it is clear that even under the older cases using those terms, a burden charactrized as "direct" was almost invariably either one **not related to the exercise of the police power** or one which resulted in an **unreasonable** exercise thereof.

On the other hand, this court has consistently upheld state action which had for its purpose the preservation of health or the promotion of safety and which was reasonably adapted to that purpose, even though the regulation prescribed equipment which must be carried on interstate trains.

These distinctions have recently found compendious expression in the decision of this court in *California* v. *Thompson*, decided April 28, 1941, 313 U. S. 109, 95 L. Ed. 1219. A pertinent excerpt is printed in the margin.*

Other cases recognizing the right of the states to adopt measures which are intrinsically reasonable, which have for their object those ends properly within the sphere of the police power and which are not in conflict with existing

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* *California* v. *Thompson*, 313 U. S. 109, at page 113:

"As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, *even though the regulation affects interstate commerce*. Ever since *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245, 7 L. ed. 412, and *Cooley* v. *Port Wardens*, 12 How. (U. S.) 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in *Di Santo* v. *Pennsylvania*, *supra* (273 U. S. 40, 71 L. ed. 528, 47 S. Ct. 267).

"A state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. *Smith* v. *Alabama*, 124 U. S. 465, 31 L. ed. 508, 8 S. Ct. 564, 1 Inters. Com. Rep. 804; *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96, 32 L. ed. 352, 9 S. Ct. 28, 2 Inters. Com. Rep. 238. It may define the size of crews manning interstate trains. *Chicago, R. I. & P. R. Co.* v. *Arkansas*, 219 U. S. 453, 55 L. ed. 290, 31 S. Ct. 275; *Missouri P. R. Co.* v. *Norwood*, 283 U. S. 249, 75 L. ed. 1010, 51 S. Ct. 458, 30 N. C. C. A. 639, and

federal regulation are noted under this point because a study of them corrects in general terms appellant's misapprehension of the distinction between state action which burdens interstate commerce **as its immediate purpose and object** and such action as no less certainly affects interstate commerce but does so only **incidentally to an exercise of the state's police or other proper power.**

Such of these cases as are more immediately pertinent to the instant case are considered in their more specific applications in later and more appropriate points.

In *Chicago, R. I. Pac. R. R. Co.* v. *Arkansas*, 219 U. S. 453, this court upheld the Arkansas Full Crew Law, a statute fixing the minimum number of men required on trains, notwithstanding the fact that the state of Arkansas enforced it in respect to trains travelling directly in interstate commerce.

In *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, this court upheld a state regulation prescribing the type of stoves to be carried on interstate trains.

In *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280, this court upheld a state statute requiring headlights of a certain size and type, even though the statute was enforced with respect to trains travelling between states.

In support of its contention that even in the absence of

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prescribe regulations for payment of their wages. *Erie R. Co.* v. *Williams*, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L. R. A. (N. S.) 1097. It may require interstate passenger cars to be heated and guard posts to be placed on bridges of an interstate railroad. *New York, N. H. and H. R. Co.* v. *New York*, 165 U. S. 628, 41 L. ed. 853, 16 S. Ct. 418. It may limit the speed of interstate trains within city limits. *Erb* v. *Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 S. Ct. 819. It may require an interstate railroad to eliminate grade crossings. *Erie R. Co.* v. *Public Utility Comrs.*, 254 U. S. 394, 409, 412, 65 L. ed. 322, 333, 334, 41 S. Ct. 169, P. U. R. 1921C 143. It may pass local quarantine laws applicable to merchandise moving in interstate commerce as a means of protecting local health. *Morgans, L. & T. R. & S. S. Co.* v. *Louisiana*, 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114; *Compagnie Francaise de Navigation a Vapeur* v. *State Bd. of Health*, 186 U. S. 380, 460 L. ed. 1209, 22 S. Ct. 811. It may regulate and protect the safe and convenient use of its harbors and navigable waterways unless there is conflict with some act of Congress. *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245, 7 L. ed. 412, *supra*; see *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 267, 80 L. ed. 215, 219, 56 S. Ct. 194.

congressional action, the regulation now in question is invalid, appellant cites and relies heavily, if not principally, upon this court's decision in the case of *South Covington & Cincinnati Street Railway Co.* v. *Covington*, 235 U. S. 537. The fact is that the *Covington case*, cited by appellant as conclusive of the issues in this case, in fact actually **supports appellees' contentions** and confirms the principles announced in the cases relied upon by appellees, without in any wise changing, modifying, or reversing any of them.

In the *Covington case*, this court held **invalid** those portions of a city ordinance that sought to regulate the number of passengers to be transported by street car from Kentucky to Ohio, as well as those provisions that sought to regulate the temperature of the cars. But in the same opinion this court held **valid** those portions of the **same ordinance** which contained provisions **forbidding the carrying of passengers on front and rear platforms unless such platforms were equipped with suitable rails or barriers.**

The court further held **valid** those provisions which **required cleaning and ventilation of the cars at least once a week and fumigation with a disinfectant subject to control by the city board of health.**

There is an incisive analogy between the decision in the *Covington case*, which held valid the provisions with respect to "suitable hand rails" for the protection of the public, and the order in the instant case, which requires the carrying of a caboose on the rear of appellant's trains. The mere fact that a caboose might be taken over the Eads Bridge or the Merchants Bridge into Missouri is purely consequential, just as it was consequential that the rail or barrier on the front and rear platforms of the street cars in the *Covington case* would necessarily be carried from Kentucky into Ohio.

Counsel for appellant erroneously assume that the basis of the court's distinction between those portions of the ordinance which were held valid and those portions which were held unconstitutional was that the provisions sustained

by this court could be complied with entirely in the State of Kentucky. **This was not the distinction drawn by the court.** It is clear from a reading of the whole of the opinion in this case that the provisions with respect to maintaining a minimum temperature and with respect to the number of passengers which might be carried were held **unreasonable**, since it appeared that it was not feasible to assure a minimum temperature within the car regardless of variations of weather temperature, nor did the carrying of a number of passengers greater than that which could be comfortably accommodated result in real danger to life **unless such passengers were crowded on improperly guarded platforms.**

That the true basis of the court's decision was **not** that the provisions with respect to hand rails might be enforced solely within the territorial confines of the State of Kentucky but was the **reasonableness** of the provisions, as opposed to the **unreasonableness** of other provisions, appears beyond all possible doubt from the following statement of this court at page 548:

> "We think these regulations come within that class in which the court has sustained the right of the local authorities to safeguard the traveling public • • • only incidentally affecting the interstate business, and not subjecting the same to unreasonable demands. *New York, N. H. & H. R. R.* v. *New York*, 165 U. S. 628; *Lake Shore & Michigan Southern Ry.* v. *Ohio*, 173 U. S. 285; *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 291, 292."

The cases cited by the court in the excerpt immediately above quoted as sustaining the statement above set forth are cases in which the state regulations in question could not be complied with entirely within the geographical limits of the enacting state.

The first case cited by the court in the excerpt above quoted, *New York, N. H. & H. R. R.* v. *New York*, 165 U. S. 628, upheld a statute of the State of New York which required the equipment of interstate trains with stoves in

conformity with the terms of the statute, notwithstanding the fact that such stoves had to be transported in interstate commerce.

The case of *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, cited by this court in support of its decision with respect to the hand rails in the *Covington case*, required the installation of headlights on interstate trains. Appellant is therefore clearly wrong in its contention that the ordinance was sustained because it did not affirmatively require the installation of handrails, provided that passengers were excluded from the platforms in the State of Kentucky. This court sustained the provisions in question **not** because the ordinance could be complied with entirely in Kentucky, **but on the authority of cases sustaining police regulations, even though such regulations applied to interstate trains.**

If the States of New York and Georgia may validly prescribe the type of stoves and headlights to be carried by interstate trains, if the cases sustaining such regulations required a conclusion sustaining an ordinance respecting hand rails on the front and rear of interstate street cars in the *Covington case*, it is clear that the mere fact (if, indeed, it is a fact) that appellant may have to transport its cabooses across the state line into Missouri affords no basis for declaring invalid the order now in question.

Other language of the *Covington case* indicating that the basis of the court's decision as to the validity of the provisions respecting hand rails is that of reasonableness is set forth in the margin.*

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* *South Covington and Cincinnati St. Railway Co.* v. *Covington*, 235 U. S. 537, at page 545:

"Reaching the conclusion that the traffic here regulated is of an interstate character, and therefore within the control of the Federal Congress, the further question is presented: Does the case come within that class wherein the state may regulate the matter legislated upon until Congress has acted by virtue of the supreme authority given it by virtue of the commerce clause of the Constitution. In numerous instances this court has sustained local enactments, passed in the exercise of the police power of the state, in the interest of the public health and safety, notwithstanding the regulation may in-

Similarly, in the case of *Missouri Pacific Railway Co. v. Kansas*, 216 U. S. 262, this court upheld an order of a state commission requiring the operation of a passenger train service between Madison, Kansas, and the Missouri-Kansas state line, even though there were no terminal facilities at the state line, so that as a practical matter, trains had to be run into the adjoining state.

The case last cited is particularly apposite to the instant case since there, as here, the railroad could comply with the terms of the order if it cared to build switch tracks at the state line, precisely as appellant could, if it desired, use the cross-overs on the bridges in the state of Illinois (Tr. 2-21, 2-29, 2-108).

Under the present point, as we have indicated, it is appellees' major premise that (without, for the moment, considering appellant's contention that state action has been excluded by federal action) the order in question must be sustained if its purpose is within the police power and if, upon a consideration of the particular factual complex in the instant case, the influence exerted upon interstate commerce is not unreasonable in contemplation of the relation of burdens and benefits.

It is appellees' minor premise that the present order is a reasonable exercise of the police power in the light of the instant facts. We now turn to a consideration of the proposition embodied in this latter premise.

(ii)

The order in question is, upon a consideration of the particular factual complex in the instant case, inherently reasonable.

We do not deem it necessary to cite authority for the fundamental principle that the question of reasonableness

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cidentally or indirectly affect interstate commerce. The subject was given much consideration in the Minnesota Rate Cases (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, and the previous cases dealing with this subject are therein collected and reviewed. In the light of these cases, and upon principle, the conclusion is reached that it is competent for the state to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety, and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce."

or unreasonableness was one addressed, in the first instance, to the sound discretion and to the presumably informed judgment of the Illinois Commerce Commission; and that, in the second instance, this question was addressed to the Supreme Court of Illinois.

Unless, therefore, this court can declare that both the Illinois Commerce Commission and the Supreme Court of Illinois have reached a determination so arbitrary and unreasonable as to be unconstitutional, the issue of the reasonableness of the order must be deemed to have been conclusively foreclosed in favor of appellees.

We turn briefly, then, to the facts upon which the present order was entered.

The leading facts, with appropriate reference to the record, have already been set forth in appellees' statement of the case, to which statement reference is here respectfully made. In the present argument, however, we emphasize the fact that appellant's employees are required to ride on the rear coupler of the car at points where overhead and side structures will not give clearance for them on top or at the side of the cars, that therefore they must ride on the rear coupler; that much of such riding must be done in sub-zero or other inclement weather, when the cars are coated with ice and sleet; that the evidence showed positively that such a position is essentially a precarious one; that there is particular danger of employees' being knocked off the top or the end of the train by a sudden jerk or stop; that at least one serious injury has resulted from the dangers indicated by the conditions in question; and that many of the employees' duties could be discharged from the interior of the caboose. (*See photographs*, 175, 176, 177, 191, 193, 194.)

Moreover, the evidence shows that cabooses are equipped with rear whistles and air brakes, the object of which is important when trains are backing at public crossings or in yards where other employees may be working. The evidence shows that the rear whistle "and conductor's valve,"

an emergency brake, afford the switchman on the rear end of the train practically the same control that the engineer has with reference to stopping or sounding a warning signal on approaching highway crossings or in the yards. Moreover, there is positive evidence in the record that a switchman can better observe traffic and train operations from the cupola of the caboose. The caboose also furnishes a place for necessary clerical work and for the storage of equipment, lunches and the like.

Although counsel writing this brief are anxious to restrain any argument in the nature of impassioned declamation, it is respectfully suggested that, if one imagines for but a moment the case of a man hanging on the side handholes or the rear coupler of a freight train, for a matter of hours, blinded by snow in a temperature well below zero, clinging to iron bars coated with ice, while the train is going first forward, then backwards, with intermittent jerks, kicks and stops, and if one will contrast this vision with that of the interior of a caboose, he will be unable to say that the Illinois Commerce Commission and the Supreme Court of Illinois have acted so arbitrarily and unreasonably in requiring cabooses on appellant's trains that this court has no alternative, under the mandate of the Constitution, but to declare the regulation void.

II.

Congress has not by affirmative action pre-empted the subject matter of the present order from the jurisdiction or powers of the State of Illinois.

Appellant contends that even if, in the absence of federal action, the State of Illinois would have the authority under its inherent police power and other faculties of its sovereignty to impose the regulation embodied in the present order, it does not now possess that power because, as appellant maintains, Congress has so far occupied the field

as to pre-empt from the states control over the number of cabooses on interstate trains.

This contention rests upon two distinct fundamental misconceptions, which misconceptions may, it is submitted, be corrected by the following observations:

First. Appellant is incorrect in its basic assumption that state legislation is invalid merely because it relates to matters which have been the subject of federal action. The true rule is that, assuming that the state action is such that it would be valid under the police powers in the absence of federal action, it is valid unless Congress has so exerted its powers that, in the language of this court in *Kelly* v. *Washington*, 302 U. S. 1,

> "the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

In other words, mere regulation affecting the field will not oust state action. **The federal regulation must be of such character that it is inconsistent with the state action in question.**

Second. Appellant misapprehends the scope of the federal legislation upon which it relies in its argument that Congress has pre-empted the field. It will be shown that notwithstanding appellant's contention to the contrary, the acts of Congress cited by appellant do not amount to such an assumption by Congress of the subject matter of the present order as to exclude state action.

(1)

State action, if within the police power, is valid unless Congress has affirmatively excluded its exercise by acting directly and immediately upon the subject matter in question so that the state action is repugnant to the pledged action. Such power is not excluded merely because Congress has regulated a part of the field.

Before considering the specific acts upon which appellant relies as excluding state action in the present case, we briefly consider the scope of the principle that federal

action with respect to interstate commerce excludes state action.

The governing criterion is set forth in the case of *Missouri Pacific R. R. Co. v. Norwood*, 283 U. S. 249. That case has already been cited as supporting the present order as a reasonable exercise of the state's police power. The case is likewise pertinent under the present point, however, for it dealt—adversely to the contentions of appellant in the present case—with the contention that federal action excluded state action merely because they related to a similar subject matter.

That case, as we have observed, involved the Arkansas Full Crew Law, which regulated the number of men on crews of interstate trains. It was contended there, as it is contended here, that federal action had excluded state action.

This court said at page 256:

> "In the absence of a clearly expressed purpose so to do, Congress will not be held to have intended to prevent the exertion of the police power of the states for the regulation of the number of men to be employed in such crews."

This court's opinion in the case of *Kelly v. Washington*, 302 U. S. 1, already briefly noticed, affords a clear exposition of the general principle in question. In that case it was contended that state legislation providing for the inspection and regulation of motor tugboats operated in intrastate, interstate, and foreign commerce over navigable waters was void, because Congress had occupied the field.

Federal enactments regarding motorboats constituted, in the words of the court, "a maze of regulations". However, the Federal Motorboat Act (1910, 36 Stat. 462), which had been passed when internal combustion engines were exceedingly uncommon, regulated only motor boats powered by steam. An amendment passed in 1936 (c. 628,

49 Stat. 1544) extended such regulation to motorboats of 300 gross tons and over, propelled by internal combustion engines. Thus left unregulated by the Government were respondent's vessels, which, though having internal combustion engines, were of less than 300 tons' burden.

In spite of this partial occupation of the field by Congress, this court sustained state regulation over the respondent's boats. The court said at page 9:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases*, 230 U. S. 352. States are thus enabled to deal with local exigencies and to exert **in the absence of conflict with federal legislation** an essential protective power. * * * There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, **is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'** "

Similarly, in *Northwestern Bell Teleph. Co.* v. *Nebraska*, 297 U. S. 471, this court sustained a state requirement of a composite depreciation rate of 3½% on all its depreciable property in Nebraska, notwithstanding the fact that the Interstate Commerce Act, Sec. 1 (1) and Sec. 20 (1)(5), as amended in 1936 (36 Stat. 555), gave the Interstate Commerce Commission authority in its discretion to prescribe uniform systems of accounts for telephone companies, and made it unlawful for them **to keep any accounts other than those prescribed by the Commission.**

The court said at page 480:

> "No exertion of federal authority * * * forbids the making of entries in appellant's accounts or the

doing of anything that is by the state commission's order directed to be done. Pending action by the Communications Commission establishing depreciation rates for telephone companies, state control over such rates remains unimpaired."

In the case of *Welsh* v. *New Hampshire*, 306 U. S. 79, this court upheld a statute of the State of New Hampshire which provided for the control of the hours of service of drivers of motor carriers in interstate commerce. It was contended that the provisions of the state act were excluded by the Federal Motor Carriers act of 1935, and the regulations prescribed under it by the Interstate Commerce Commission. This court sustained the regulation, notwithstanding that Congress had addressed the same subject matter, because there was neither a conflict between state and federal regulations nor a clearly evinced intent by Congress to exclude state regulation.

The purpose of the Commission's order in the present case is to preserve the lives, promote the safety, and protect the health of employees and of the public. It is submitted that federal intent to forbid such action by the state should "not be lightly implied"; but that the order should be sustained unless it is in direct conflict with applicable federal regulation or is patently inconsistent with a clearly expressed federal purpose.

Under the immediately following subpoint, we shall show that notwithstanding appellant's argument to the contrary, the order in question is **not** in conflict with any applicable federal statute or administrative regulation.

(ii)

The present order is not in conflict with any applicable federal act or regulation.

Appellant relies upon the following acts or portions of acts as constituting federal pre-emption of the subject matter of the present order:

The Railway Labor Act (U. S. C. A., Title 45, Supplement 236, *et seq.*).

The Interstate Commerce Act, particularly Sec. 1, Pars. (10) through (17), and (21); Sec. 26, and Sec. 20 (a) [U. S. C. A., title 49].

The Boiler Inspection Act (45 U. S. C. A., page 78, Sec. 22, *et seq.*).

The Safety Appliance Act (45 U. S. C. A., Sec. 1, *et seq.*, page 3, *et seq.*).

Appellees will demonstrate that none of the enactments above relied upon is either inconsistent with the regulations or evincives of an intent to exclude from state authority the subject matter of the present order.

The Railway Labor Act.

In the first place, the national Railway Labor Act pertains only to disputes between employers and employees with respect to working conditions and the like. The present order was promulgated not only for the safety of appellant's employees, but for the safety of the public.

In the second place, that act does not confer authority upon any federal agency to regulate the operations or facilities of railroads, the primary intent of the act being to compel the railroads to deal collectively with their employees for the purpose of eliminating strikes. The act provides, first, that employees may organize and bargain collectively; and that after a dispute arises they shall first attempt to adjust it among themselves; and that thereafter

either party may invoke the services of the adjustment board, request mediation, or agree to arbitration.

The case of *Missouri Pacific R. R. Co.* v. *Norwood*, 283 U. S. 249, has already been cited because it contains an excellent statement of the principle that state regulation will not be pronounced invalid unless in conflict with the express or clearly implied will of Congress. That case is immediately in point in the present connection, however, because in that case it was contended that the Arkansas Full Crew Law was rendered invalid by the National Railway Labor Act. This court held that the Railway Labor Act, by its reference to the subject of working conditions, did not preclude the states from enacting a law governing the number of members of crews on interstate trains. The measure being one intended for the safety of the public as well as of employees, it could not be said that the state sought to supersede the federal program for the adjustment of disputes as to working conditions.

It is submitted that the order in question is not inconsistent with either the express provisions or the intent and purpose of the Railway Labor Act.

The Interstate Commerce Act.

Appellant argues that the order in question is in conflict with the Interstate Commerce Act. Appellant does not point either to any provision within the text of that act or to any regulation promulgated under its authority which is in conflict or inconsistent with the order in question. Precisely the same contention was made in the Arkansas Full Crew case, already cited and discussed in other connections (*Missouri Pacific R. R. Co.* v. *Norwood*, 283 U. S. 249). This court rejected the contention, holding that nothing in the Interstate Commerce Act derogated from the state's power to adopt reasonable safety measures.

Sec. 1, Par. 17, of the Interstate Commerce Act (U. S. C. A. Title 49, page 120) contains the following provisions:

"• • • Provided, however, that nothing in this

chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, **except in so far as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter.**"

It is clear, both from the text of the Interstate Commerce Act and from the decisions of this court pronounced since its enactment, that it was not the intent of Congress so to pre-empt the field of interstate railroading or that the states should no longer have the authority, in the exercise of their police power, to adopt reasonable measures for the preservation of the lives and health of their citizens and of railroad employees. No such revolutionary or far-reaching purpose has been expressed by Congress, nor has such a purpose been recognized by any decision of this court.

This is clearly emphasized by the fact that Congress itself has explicitly declared, in the excerpt above quoted, that nothing in the entire chapter shall impair or affect the state's police power except in so far as any state requirement may be inconsistent with any lawful order of the Commission made under the provisions of the chapter.

Appellant fails to indicate any provision of the act which is repugnant to the Interstate Commerce Act or which, in the language of Congress,

> "is inconsistent with any lawful order of the Commission made under the provisions of this chapter."

> sion made under the provisions of this chapter,"

or such that, in the language of this court, already cited,

> "the repugnance is so 'direct and positive' that the two acts 'cannot be reconciled or consistently stand together.'"

Appellant relies on the case of *Railroad Commission* v. *Southern Pacific*, 264 U. S. 331. That case is not parallel to the instant case on the facts; but the principle which it recognized supports the appellees, not appellant. In that case this court said:

> "Only a lawful order of the Interstate Commerce Commission would raise the question of the power of

> the state commission in such case, as the proviso of page 17, Chapter 402, of the Transportation Act shows,"

the proviso above cited being that immediately quoted above in this argument.

There is nothing in the record in the instant case to show that the Interstate Commerce Commission has in any wise sought to regulate appellant's cabooses or that it has undertaken to forbid state regulation.

In the absence of any such showing, the presumption must be that there was no such regulation, since the state courts do not take cognizance of administrative orders of the Interstate Commerce Commission. *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 512; *City of Detroit* v. *Wabash Refining Co.*, 223 Ill. App. 246, 251; *Thompson* v. *Missouri Pacific R. R. Co.*, 15 Fed. (2) 28, 31 (C. C. A. 8th).

Thus both Congress and this court have declared that the Interstate Commerce Act (which act includes the Transportation Act) does not derogate from the states' police power unless the Commission has promulgated a regulation which is in direct conflict with state action.

Since no such regulation exists in the instant case, it must be concluded that appellant is incorrect in its argument that the present order must fail because of the Interstate Commerce Act.

The Safety Appliance Act and the Boiler Inspection Act.

Appellant's argument that the Safety Appliance Act (45 U. S. C. A., Sec. 1, *et seq.*, at page 3) and the Boiler Inspection Act (45 U. S. C. A., page 78, Sec. 22) exclude the Illinois Commission's jurisdiction to enter the order in question is likewise based upon the fundamental premise that the mere fact that Congress has legislated with respect to a particular subject matter is in and of itself sufficient to exclude state action. We have already shown under

Sub-Point (i) of the present Point in this brief that this initial premise is unsound, the true test being whether the state action is directly repugnant to federal action.

Appellant fails to point out any provision of either the Safety Appliance Act or the Boiler Inspection Act which is inconsistent with the regulation now under review.

In support of the contention that the present order is in conflict with the Safety Appliance Act, appellant relies on the case of *Penn. R. R. Co.* v. *Public Service Commission*, 250 U. S. 566. That case does not support appellant; but it is nevertheless of interest in the present case because it affords an excellent illustration of the kind of repugnance between state and federal action which is within the rule that state regulation will not be sustained when it contradicts federal regulation. In that case the federal regulation required caboose cars **without platforms**. The state regulation required caboose cars **with 30-inch platforms**. It would have been impossible to obey the state regulation without violating the federal law. We submit that the mere statement of the facts in that case makes it evident that the decision in that case cannot control the decision here.

In this case it does not appear that there is any regulation on the part of the Interstate Commerce Commission with respect to cabooses. But even if it appeared in this case, as it affirmatively appeared in the case last above cited, that the Interstate Commerce Commission had regulated the **type** of cabooses which must be used **when cabooses were to be used at all**, still those regulations would be completely silent as to when, where, and under what circumstances appellant would be required to carry cabooses on its trains. Therefore, so far as anything in the Safety Appliance Act is concerned, the State of Illinois possesses the same power to order cabooses that it has always had, in virtue of its police power, except that of

course it could not command a type of cabooses on interstate trains which was forbidden by act of Congress or a valid order of the Interstate Commerce Commission.

* * * * *

Appellant's argument that the order is void because federal action has superseded the state's jurisdiction is erected entirely upon its assumption that mere regulation of the subject matter by Congress excludes regulation by the states. The correct rule is, as has been shown, that the state's police power is not impaired if its regulations are not so directly repugnant to federal action that both state and federal regulations cannot stand. Appellant has totally failed to point to any regulation inconsistent, either in its direct terms or by fair implication, with the order in question; nor has appellant cited any act by which Congress has assumed plenary and exclusive jurisdiction of the field.

Therefore it is submitted that appellant's argument that the order in question is void for repugnancy to federal action cannot be sustained.

III.

The order does not deprive appellant of its property without due process of law.

It is contended by appellant that the benefits accruing from the order are in effect so disproportionate to the expense involved and that the cost so exorbitant compared to the benefits that the order constitutes a deprivation of appellant's property without due process of law, in contravention to the Fourteenth Amendment to the Constitution of the United States.

It is contended that the order requiring the furnishing of cabooses for the protection of the life and safety of the trainmen, as well as of the public at large, would be of slight benefit as compared with the cost to which appellant would be put to in complying with the order. In other words, appellant seeks to compare the benefits derived from the order with the cost entailed by such compliance

in order to determine whether or not the order violates the due process clause.

Under Point I of the present brief, appellees have argued that the order is inherently reasonable as an exercise of the state's police power as against the contention that it unconstitutionally burdens interstate commerce. Much of that argument is pertinent here.

However, under this Point, we reply to appellant's contention that, without regard to any question raised by the learning of interstate commerce, the order is confiscatory.

Appellant seeks to minimize the dangers which the order seeks to avoid, not only to the trainmen, but to the public at large, in the proper operation of a train. It is urged that there is only a small benefit accruing to one member of each crew by reason of furnishing cabooses and that the undisputed evidence in the record shows (R. 228) that for a long time, injuries to employees on the rear end of a train have been far less when no caboose was provided than when one was furnished. This is not a fact and the record fails to support appellant's contention. Appellant relies upon its Exhibit 19, which is a compilation showing that there were eight injuries to switchmen due to *sudden stops* while they were in cabooses. The exhibit, however, fails to show how many men were injured while not in cabooses.

We submit that this exhibit clearly emphasizes the necessity for the order to protect the life, health and safety of the trainmen. If as a result *of sudden stops*, switchmen are injured while in cabooses, how much more so are they likely to be injured while they are required to ride the rear coupler of a car and particularly so during inclement weather?

In *C. B. & Q. R. R. Co. v. Commerce Commission*, 364 Ill. 213, 222, one of the cases cited and relied upon appellant, the Court, in passing upon this question aptly said:

"The fact that only one employe has been killed is not of itself sufficient to show that a dangerous con-

> dition does not exist. * * * When a hazard is shown to exist and may be eliminated without unreasonable expense or imposing onerous conditions, it is not necessary to wait until casualties result before requiring the evil to be remedied, even though other hazards necessarily incident to the business still remain."

In the statement of facts, *supra*, appellee has called attention to the testimony showing the reasonable expenses involved in the furnishing of the equipment by appellant and has pointed out that the extravagant claims as to exorbitant costs by appellants are wholly unsupported by any competent evidence in the record.

The Supreme Court of Illinois in the instant case, after calling attention to the fact that there was a sharp dispute in the testimony on the question of expenses of labor involved and the purchase of the caboose, said:

> "We are of the opinion that those expenses on this record are to be classed with those inconveniences referred to in the cases herein cited as not affecting the power of the State to impose the regulation, unless so clearly unreasonable as to be beyond State power. This record does not so indicate."

We submit that this decision of the Supreme Court of Illinois on this record is correct.

Appellant in its brief relies upon numerous authorities therein cited, some of which have no application whatever to the case here under consideration, while the balance fu... support the decision of the Supreme Court of Illinois herein.

In *Chesapeake and Ohio Railway Company* v. *Public Service Com.*, 242 U. S. 603, 61 L. Ed. 520, one of the cases cited and relied upon by appellant, this Court lays down the rule applicable to the case herein in question in the following language (page 607):

> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This

duty arises out of the acceptance and enjoyment of the powers and privileges granted by the state, and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, **and its performance cannot be avoided merely because it will be attended by some pecuniary loss.**" (Emphasis ours.) Citing: *Atlantic Coast Line R. Co.* v. *North Carolina Corp. Commission*, 206 U. S. 1, 26, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Missouri P. R. Co.* v. *Kansas*, 216 U. S. 262, 279, 54 L. ed. 472, 479, 30 Sup. Ct. Rep. 330; *Washington ex rel. Oregon R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510, 529, 56 L. ed. 863, 870, 32 Sup. Ct. Rep. 535; *Chicago, B. & Q. R. Co.* v. *Railroad Commission*, 237 U. S. 220, 229, 59 L. ed. 926, 931, P. U. R. 1915C, 309, 35 Sup. Ct. Rep. 560.

In *Washington ex rel. Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510, likewise relied upon by appellant, this Court said at page 529:

> "If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, **even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.'**"

In *Panhandle E. Pipe Line Co.* v. *State Highway Com.*, 294 U. S. 613, also relied upon by appellant, this Court recognizes that the police power of a state springs from the obligation of the state to protect its citizens and to provide for the safety and good order of society; that as a part of the governmental power of self-protection, it is permitted reasonably to regulate rights and property; and that a railway company, in accepting its franchise from the state, necessarily does so subject to the condition that it would conform, **at its own expense**, to any regulations, not arbitrary in their character, which have for their object the safety of the public or the promotion of the public convenience.

See also *Atlantic Coast Line R. R. Co.* v. *North Carolina Corp. Com.*, 206 U. S. 1, 25, 26.

In the opinion of the Supreme Court of Illinois in the instant case, various decisions are quoted in which this Court has held that the railroad companies were not deprived of their property without due process of law. *New York, New Haven Co.* v. *New York*, 165 U. S. 628; *Atlantic Coastline Co.* v. *Georgia*, 234 U. S. 280, and others.

We submit that most of the cases relied upon by appellant fully support our position herein. A few of the cases cited by appellant are easily distinguishable on the facts, such as that of *Pennsylvania Coal Co.* v. *Mahon*, 261 U. S. 393, in which it was held that a statute forbidding the mining of coal under private dwellings or streets was unconstitutional as taking property without due process of law where the right to mine coal was expressly reserved under a grant.

We submit that if appellant elects to operate freight trains and employ switchmen in connection therewith, it cannot evade its duty imposed by law to furnish all reasonable means and methods to protect its crews and the public against hazards, accidents and injuries.

The cost involved, we submit, is insignificant compared to the good achieved and to be achieved by the order entered by the Illinois Commerce Commission in providing for cabooses so as to avoid not only the accidents that occur but also to minimize the dangers and hazards to which the switchmen are subjected in the course of their occupation.

The order does not, as contended, deprive appellant of its property without due process of law.

* * * * *

In the foregoing discussion, appellees have argued the merits of the issue of confiscation precisely as though the question of the reasonableness of the order were addressed to this court in the first instance. However, the question properly before this court is, of course, not whether this

court would dispose of the question of confiscation favorably to appellant in the exercise of its independent judgment, but whether the Illinois Commission and the Supreme Court of Illinois could reasonably find that the order in question was proper.

It is respectfully submitted that, in so far as the question of reasonableness and confiscation is concerned, the order is supported by very substantial evidence, and that therefore it should not be disturbed by this court.

CONCLUSION.

For the reasons urged in the foregoing argument, appellees submit that the judgment of the Supreme Court of Illinois affirming the order of the Illinois Commerce Commission in question was correct and that it should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 218.—October Term, 1942.

Terminal Railroad Association of St. Louis, Appellant, vs. Brotherhood of Railroad Trainmen, et al.	On Appeal from the Supreme Court of the State of Illinois.

[January 18, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

Appellant is a corporation engaged in performing terminal services and furnishing terminal facilities in and about East St. Louis, Illinois, to a number of railroad companies which share its ownership and control. It operates several yards for the sorting and classification and interchange of cars, with some service to industries within the switching district.

The Brotherhood of Railroad Trainmen, one of the appellees, representing trainmen and switchmen employed by appellant, complained to the Illinois Commerce Commission of appellant's failure to provide caboose cars for its employees. In answer the appellant denied that the Commission had power to enter any order that would relate to movements in interstate commerce, which it said included substantially all of its operations; and it contended further that it had already provided all reasonably necessary facilities. The issues were sharply contested before the Commission, and the evidence, while it may not have required, certainly permitted these conclusions:

Appellant's switching crews make and break up trains of cars and deliver and transfer them. One man of each crew is required to ride the rear car of the train when it is in motion. Depending upon the distances by which fixed structures along the track clear this car, he rides its top or side, and in some places both top and side clearances are so small that he must ride on the drawbar projecting from the end of the car. Sudden jerks and stops are common and they have on occasion thrown off switchmen. The duties of the rear switchman include lining switches into position after the train has passed and watching street and highway crossings to

protect the public when the train is backing up. In cases of emergency he must stop the train by turning an air valve located next to the drawbar, which he cannot readily or safely do if he is riding on the top or side of the car.

During some seasons of the year he is exposed to rain, sleet, snow and ice, which also cover the parts of the car to which he must cling to stay on it, thus adding to his difficulties.

Appellant's trains, when not equipped with cabooses, have no storage space for safety devices, flagging equipment, or for extra clothing, lunches and drinking water of the men; and they provide no space in which the men can perform their clerical duties.

The Commission found that by providing cabooses the appellant could eliminate the necessity for the rear switchmen to ride the tops, sides, or draw-bars of the rear cars; afford safe and ready access to the air valve; and provide space for storage and for clerical work. It found that it was essential to the health, safety, and comfort of the rear switchmen that the appellant provide cabooses on all of designated runs in so far as they were within the confines of the State, and made its order accordingly. The order was sustained by the Supreme Court of Illinois as "obviously promulgated to protect the lives and health of citizens of this State engaged in appellee's business within the State," and as not imposing an unlawful burden upon interstate commerce.[1] The case is here on appeal.[2]

All but an insignificant number of the cars in the trains on the specified runs move in interstate commerce, so that the order pertained to a matter clearly within the power of Congress to regulate interstate commerce.

Appellant claims that there had been Congressional occupation of the field by virtue of the Boiler Inspection Act,[3] the Safety Appliance Act,[4] and the Interstate Commerce Act.[5] It is not contended, nor do we understand, that these statutes, by them-

[1] 379 Ill. 403.

[2] § 237(a) of the Judicial Code, 28 U. S. C. § 344(a).

[3] 45 U. S. C. §§ 22-34.

[4] 45 U. S. C. § 1 *et seq.*

[5] 49 U. S. C. § 1 *et seq.* Particular reliance is put upon paragraphs (10), (11), (13), (14), (15), (16), (17) and (21) of § 1, relating to the Commission's powers in respect to car service; and upon paragraph 2 of § 20(a), relating to its powers over the issuance of securities and the assumption of liabilities thereon. We have not been informed whether such issuance or assumption is needed to obtain the cabooses which the Illinois Commission has ordered to be used.

selves and unimplemented by any action of the Interstate Commerce Commission, lay down any requirement that cabooses shall or shall not be used on any of the runs in question. Nor is it contended that the Interstate Commerce Commission itself has sought to make any such requirement. At least in the absence of such action these Acts do not themselves preclude the state order, *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280; cf. *Welch Co.* v. *New Hampshire*, 306 U. S. 79, and it is unnecessary to consider on this occasion and without the participation of the Interstate Commerce Commission what may be the extent of its power under these Acts. If it should in the exercise of granted power determine whether appellant must provide cabooses, the State would be powerless to gainsay it. This and no more is the effect of *Pennsylvania Railroad Co.* v. *Public Service Commission*, 250 U. S. 566.

The Railway Labor Act,[6] also relied upon by appellant, remains for consideration and presents questions of a different order, not heretofore examined in any opinion of this Court.[7] The purpose of this Act is declared to be to provide "for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions"; and "for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."[8] It places upon carriers and employees the duty of exerting every reasonable effort to settle these disputes by agreement, and prohibits the carrier from altering agreed rates of pay, rules or working conditions except in the manner provided by the agreement or by the Act itself.[9] Machinery is set up for the adjustment, mediation, and arbitration of disputes which the parties do not succeed in settling among themselves.[10] The First Division of the National Railroad Adjustment Board has jurisdiction over disputes involving train and yard-service employees of carriers, which may be referred to it by agreement of both parties or by either party.[11] Its awards are made "final and binding" upon

[6] 45 U. S. C. § 151 *et seq.*

[7] Cf. Missouri Pacific R. Co. v. Norwood, 283 U. S. 249, 258.

[8] 45 U. S. C. § 151a.

[9] 45 U. S. C. § 152, paragraphs 1 and 7.

[10] 45 U. S. C. § 153 *et seq.*

[11] 45 U. S. C. § 153(h)(i); see also § 155.

both parties to the dispute[12] and the carrier may be required by the courts to comply, the Board's findings being, in a proceeding for such purpose, prima facie evidence of the facts therein stated.[13]

The order before us is the outgrowth of a dispute between the carrier and its employees. The contract between the appellant and the Brotherhood contains provision for cabooses for certain trains and services, but does not provide for those ordered by the Illinois Commission. We assume, without deciding, that the demand for additional caboose service and its refusal constitute a dispute about working conditions, and that the National Railroad Adjustment Board would have jurisdiction of it on petition of the employees or their representative and might have made an award such as the order in question or some modification of it. The question is whether the Railway Labor Act, so interpreted, occupied the field to the exclusion of the state action under review. We conclude that it does not, and for the following reasons:

The Railway Labor Act, like the National Labor Relations Act,[14] does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers. Cf. *Pennsylvania R. R.* v. *Labor Board*, 261 U. S. 72, 84.

State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for

[12] 45 U. S. C. § 153(m).
[13] 45 U. S. C. § 153(p).
[14] 29 U. S. C. § 151 *et seq.*

better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. We suppose employees might consider that state or municipal requirements of fire escapes, fire doors, and fire protection were inadequate and make them the subject of a dispute, at least some phases of which would be of federal concern. But it cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question.

We must decide the question of state power in this case in the absence of any Act of Congress that conflicts with the order or may be said to occupy its field.

The order of the State Commission requires that cabooses be used on appellant's trains making runs of two different sorts. Runs of the first sort are made by trains which, although they begin and end and make their entire movements within the State, are made up almost entirely of cars moving in interstate commerce. Runs of the second sort are made by trains which move between points in East St. Louis, Illinois, and St. Louis, Missouri, and cross one or the other of two bridges spanning the Mississippi River and the state line. On its face the order requires only that cabooses be used within Illinois, and does not require that they be used in Missouri. Appellant contends, and we assume, however, that there do not exist, and that it is not reasonably practicable to install, facilities for taking on and dropping off cabooses at the points where the trains cross the state line; and that the practical consequence of the order is that if cabooses are to be used in Illinois on runs of the second sort they must also be used at least as far as the nearest switching point in Missouri.

As to both classes of runs, the effect of the order is in some measure to retard and increase the cost of movements in interstate commerce. This is not to say, however, that the order is necessarily invalid. In the absence of controlling federal legislation this Court has sustained a wide variety of state regulations of railroad

trains moving in interstate commerce having such effect.[15] The governing principles were recently stated in *Parker* v. *Brown* (No. 46, decided January 4, 1943), pp. 14-15.

We are of opinion that under these principles the order is valid as to runs of both sorts. It finds its origin in the local climatic conditions and in the hazards created by particular local physical structures, and it has rather obvious relation to the health and safety of local workmen. The record in the case does not afford a sure basis for calculating the costs to commerce resulting from the order against the costs to the safety and health of the workmen which it was intended to minimize, and there is evidence in the case that nearby railroads have seen fit in the absence of legal compulsion to provide cabooses in circumstances substantially similar to those upon which appellant relies to establish absence of state power.

If lack of facilities at the state line requires as a practical matter that in order to provide cabooses in Illinois appellant must also provide them for some distance in Missouri, that fact does not preclude Illinois from regulating the operation to the limits of its territory. *Missouri, R. Co.* v. *Kansas*, 216 U. S. 262; cf. *South Covington Ry.* v. *Covington*, 235 U. S. 537.[16]

The judgment of the court below is

Affirmed.

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[15] See cases cited in California v. Thompson, 313 U. S. 109, 113-114.

[16] This case involved a street-car line running between Covington, Kentucky, and Cincinnati, Ohio, over a bridge connecting the two cities. The City of Covington required that: (1) passengers must not ride on car platforms unless the platforms were equipped with suitable rails and barriers; (2) the cars must be kept clean, ventilated and fumigated; (3) the temperature of the air in the cars must never fall below a stated minimum; (4) in practical effect, that additional cars must be run in Cincinnati as well as in Covington in excess of the Cincinnati franchise rights and in such manner as to make probable the creation of serious impediments to other traffic in Cincinnati and conflict with Cincinnati regulations. The first two requirements were sustained. The third was struck down because the opening and closing of the car doors made compliance impossible; the fourth, because of the likelihood that serious burdens would be imposed upon interstate commerce by virtue of the impossibility of compliance with probable conflicting regulations. These factors have not been shown to exist in the present case.